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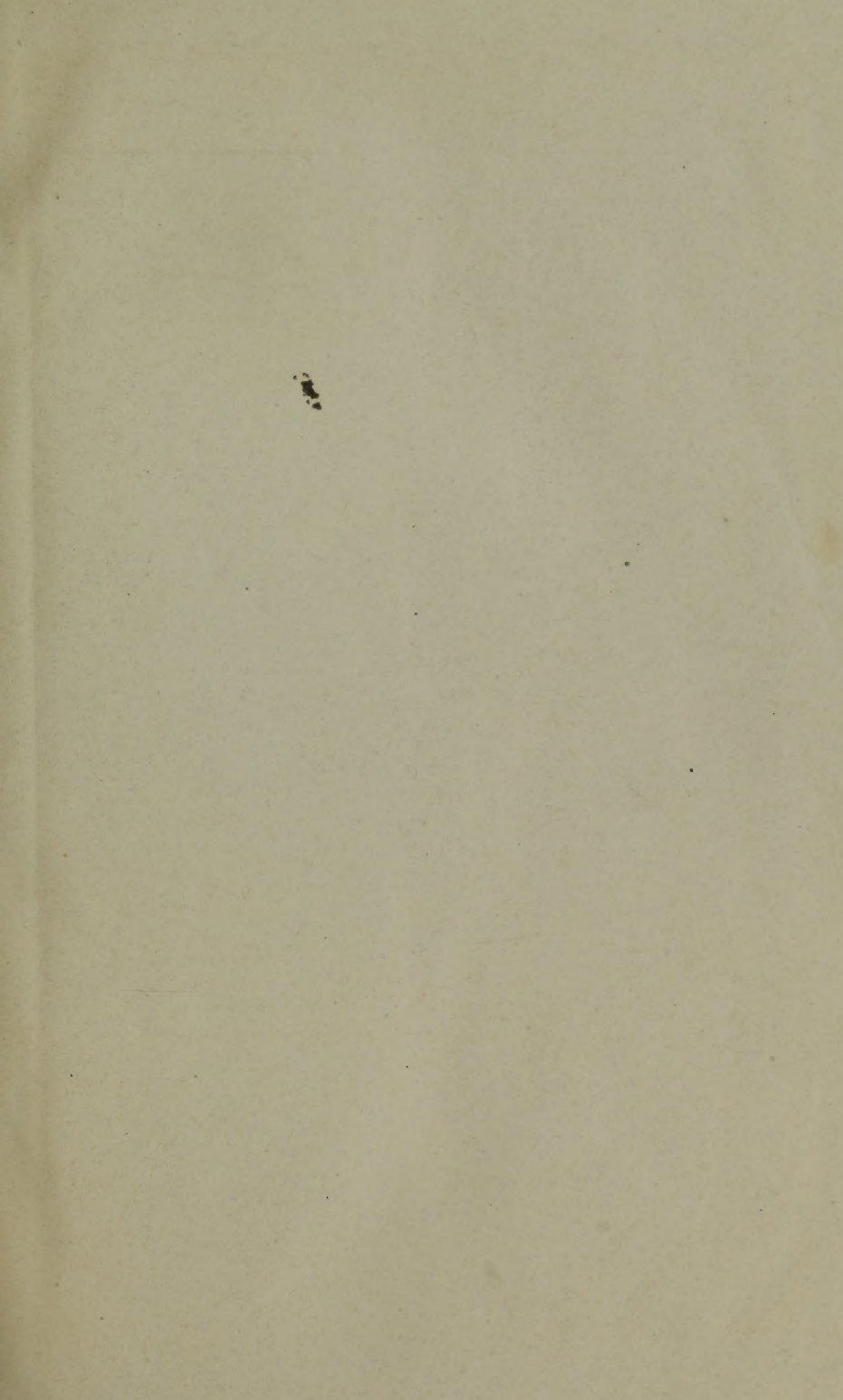
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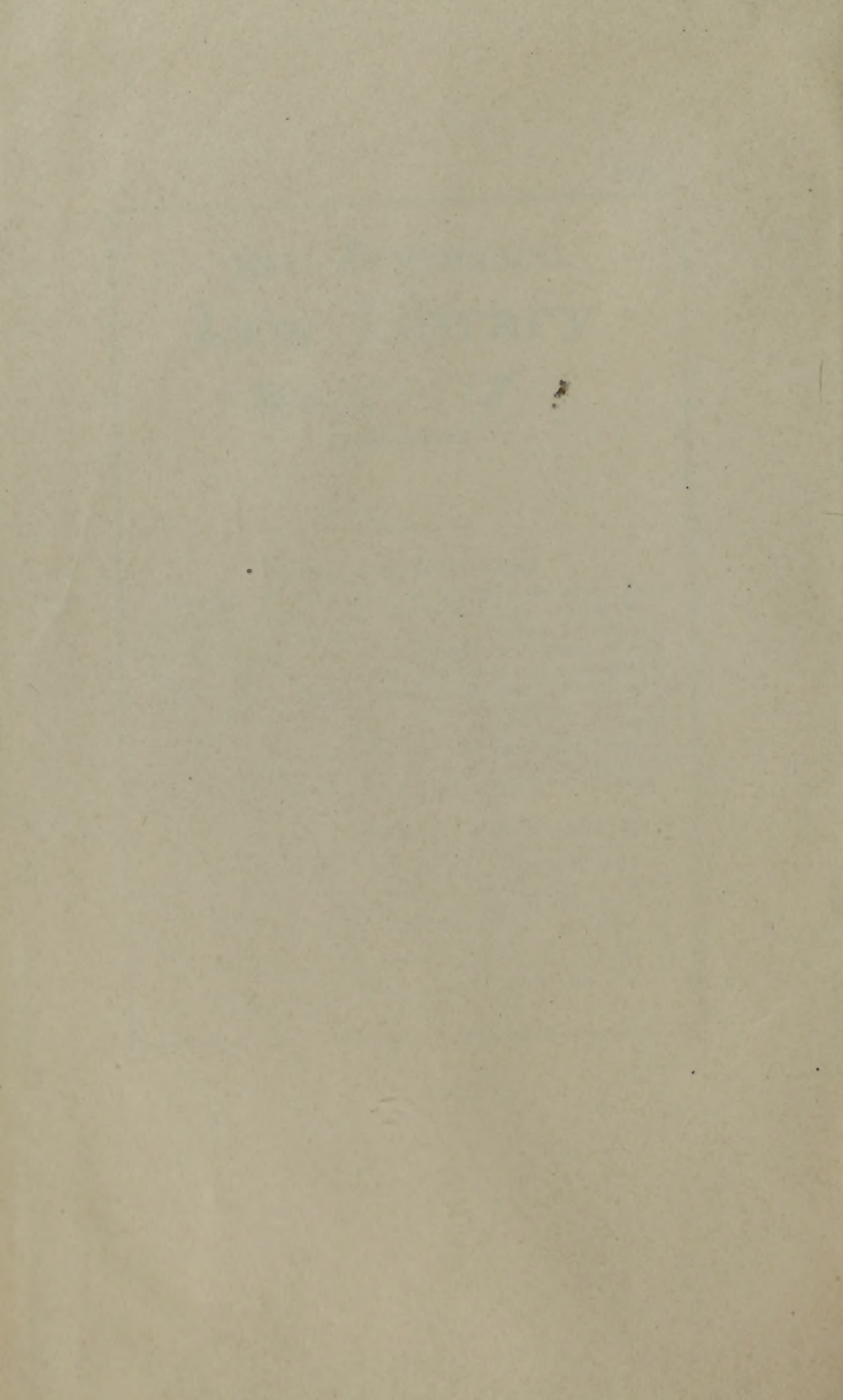
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EXTRACT FROM BY-LAWS

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No. 2028

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

J. I. LAMPRECHT and F. M. AIKEN, Trustees,
Appellants,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY
(a Corporation), THE KERN TRADING & OIL
COMPANY (a Corporation), and T. S. MINOT,
Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court
for the Southern District of California,
Northern Division.

FILED

SEP 29 1911

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Records of U. S. Circuit
Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Appellants:

D. J. HINKLEY, 1008 Wright & Callender
Building, Los Angeles, California.

E. J. BLANDIN, 1008 Wright & Callender
Building, Los Angeles, California.

For Appellees:

WM. SINGER, Jr., Flood Building, San Fran-
cisco, California.

GUY V. SHOUP, Flood Building, San Fran-
cisco, California.

D. V. COWDEN, Flood Building, San Fran-
cisco, California.

T. S. MINOT, Phelan Building, San Francisco,
California.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

No. 2028.

J. I. LAMPRECHT et al., Trustees,

Appellants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY
et al.,

Appellees.

Stipulation as to Contents of Printed Record.

It is hereby stipulated and agreed by and between said appellants and Southern Pacific Railroad Company and The Kern Trading and Oil Company, appellees, by their respective solicitors, that the printed

record on appeal of said appellants in this cause may consist of the contents of the original transcript on appeal, now on file in the office of the Clerk of said court, which is composed of copies of the following pleadings and papers, appearing in said original transcript at the pages herein specified, viz.:

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It is likewise stipulated and agreed that this stipulation shall not have the effect of depriving the appellees of the right to show, as affecting costs, that said printed record contains matter not necessary to the proper consideration of said cause.

Dated September 8th, 1911.

DELBERT J. HINKLEY,

Solicitors for Appellants, 1008 Wright & Callender Building, Los Angeles, California.

WM. SINGER, Jr.,

GUY V. SHOUP and

D. V. COWDEN,

Solicitors for Appellees, Flood Building, San Francisco, California.

[Endorsed]: No. 2028. United States Circuit Court of Appeals for the Ninth Circuit. J. I. Lam-

4 *J. I. Lamprecht and F. M. Aiken, Trustees,*
precht et al., Trustees, Appellants, vs. Southern
Pacific Railroad Company et al., Appellees. Stipu-
lation as to Contents of Printed Record. Filed Sep.
12, 1911. F. D. Monckton, Clerk.

[Citation (Original).]

UNITED STATES OF AMERICA.

To Southern Pacific Railroad Company, a Corpora-
tion, The Kern Trading & Oil Company, a Cor-
poration, and T. S. Minot, Greeting:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Appeals
for the Ninth Circuit, at the City of San Francisco,
thirty (30) days from and after the day this Cita-
tion bears date, pursuant to an appeal allowed filed
in the Clerk's Office of the Circuit Court of the United
States for the Southern District of California, North-
ern Division, wherein J. I. Lamprecht and F. M.
Aiken, Trustees, are appellants and you are appellees,
to show cause, if any there be, why the decree ren-
dered against said appellants as in said appeal men-
tioned, should not be corrected and speedy justice
should not be done to the parties in that behalf.

Witness the Honorable WILLIAM W. MORROW,
Judge of the Circuit Court of Appeals for the Ninth
Circuit, this 30th day of June, 1911.

WM. W. MORROW,
Circuit Judge.

Service of the within Citation is hereby acknowl-
edged to have been made upon the cross-defendants
Southern Pacific Railroad Company and Kern Trad-

ing and Oil Company, by delivery of a true copy thereof to their attorneys of record on the 11th day of July, 1911.

WM. SINGER, Jr.,
GUY V. SHOUP and
D. V. COWDEN,

Attorneys for Southern Pacific Railroad Company
and Kern Trading and Oil Company.

Service of the within Citation is hereby acknowledged to have been made upon the cross-defendant T. S. Minot, by delivery of a true copy thereof to his attorney of record on the 11th day of July, 1911.

T. S. MINOT,

In Pro. Per.

Attorney for T. S. Minot.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within Citation on the 11th day of July, 1911, and under instruction from D. J. Hinkley, one of the solicitors for the Cross-complainants herein. I served the same upon the Southern Pacific Railroad Company, a corporation, and The Kern Trading & Oil Company, a corporation, by handing to and leaving a copy hereof with D. V. Cowden, who is one of the attorneys for the said Southern Pacific Railroad Company, a corporation, and by leaving a copy hereof with D. V. Cowden, who is one of the attorneys for the said Kern Trading & Oil Company, a corporation, as shown by the acknowledgment of service endorsed by said D. V. Cowden on this Original Writ. Said service was made on the 11th day of July, 1911, personally, in

6 *J. I. Lamprecht and F. M. Aiken, Trustees,*
the City and County of San Francisco, in the State
and Northern District of California.

I further return that I served the within Citation upon T. S. Minot by handing to and leaving a copy hereof with said T. S. Minot personally on the 11th day of July, 1911, in the City and County of San Francisco, in said District, as shown by the acknowledgment of service endorsed by said T. S. Minot on this Original Writ.

Dated at San Francisco, California, this 11th day of July, 1911.

C. T. ELLIOTT,
United States Marshal,
By B. F. Towle,
Office Deputy Marshal.

[Endorsed]: Marshal's Docket No. 5347: No. 192.
In the Circuit Court of the United States for the
Southern District of California, Northern Division.
In Equity. Edmund Burke, Complainant, vs. Southern
Pacific R. R. Co. et al., Defendants, and J. I.
Lamprecht and F. M. Aiken, Trustees, Cross-com-
plainants, vs. Southern Pacific R. R. Co., the Kern
Trading & Oil Co. et al., Cross-defendants. Citation.
Filed Jul. 15, 1911. Wm. M. Van Dyke, Clerk. By
Chas. N. Williams, Deputy Clerk.

*In the Circuit Court of the United States of America,
of the Ninth Judicial Circuit, in and for the
Southern District of California, Northern Di-
vision.*

No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,
et al.,

Defendants,

and

JOHN I. LAMPRECHT and F. M. AIKEN,
Trustees,

Cross-Complainants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,
a Corporation, THE KERN TRADING &
OIL COMPANY (a Corporation), and T. S.
MINOT et al.,

Cross-Defendants. [1*]

*Page number appearing at foot of page of original certified Record.

[Stipulation as to Filing Amended Bill of Complaint.]

*In the Circuit Court of the United States for the
Southern District of California, Northern Di-
vision.*

IN EQUITY—No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY
et al.,

Defendants.

It is hereby stipulated and agreed, by and between the defendants herein, that is, those represented by T. S. Minot, as their solicitor, and said complainant, that said complainant may file and serve an amended bill of complaint in this suit on or before the first day of November, 1910, and that the demurer by said defendants, represented by said T. S. Minot, to the original bill of complaint herein, may stand as their demurer to such amended bill when filed and served as aforesaid, unless an amended demurrer to new facts be required, and that the hearing of said demurer may be had November 21, 1910, or as soon thereafter as counsel can be heard.

T. S. MINOT,

EDMUND BURKE,

In Pro. Per.

October 26th, 1910. [2]

[Endorsed]: No. 192. In the Circuit Court of the United States for the Southern District of California, Northern Division. In Equity. Edmund Burke, Complainant, vs. Southern Pacific Railroad Company et al., Defendants. Stipulation. Filed Oct. 27, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [3]

*In the Circuit Court of the United States, in and for
the Southern District of California, Northern
Division.*

EDMUND BURKE,

Complainant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, The Kern Trading and Oil Company, Thomas W. Newlin, W. H. Layson, N. W. Spaulding, F. D. Culver, C. F. Bassett, Henry C. Bunker, Mary Ann Heddon, A. R. Cotton, Daniel E. Rayes, E. M. Root, Jarvis L. Doyle, E. N. Richardson, Hattie E. Miner, Helen Pollock, George A. Doyle, B. Block, Loretta B. Hart, Annie M. Fassett, Merrill D. Evans, William Miner, J. V. Ellis, Mary A. Hedden, Leonara J. Evans, Oregon Sanders, James Hedden, E. M. Redding, J. R. Manran, William Polloak, Joseph Hart, E. S. Payne, Mary J. Hida, Albert Betz, A. L. Frick, M. J. Frick, S. L. Phillips, E. Phillips, M. E. Wall, E. N. Dunweedie, Barclay McGowan, John Doe, Rochard Roe, Thomas Green, Henry Doe,

James Doe, Edward Roe, Peter Doe, Dolly Doe, Frank Doe, Joseph Doe, Jacob Doe, Isaac Doe, Katy Doe, Harry Doe, Davis Doe, Duke Doe, Minnie Doe, Bunny Doe, Jerry Doe, McGowan Doe, Grant Doe, Platt Roe, George Morton, Jno. I. Lamprecht and F. M. Aiken as Trustees, George D. Roberts, Q. L. Phelps, James Meynard Jr., A. M. Anderson, T. S. [4] Minot, Newton A. Johnson, David Ewing, D. M. Speed, Wm. Johnson, S. J. Gallagher, O. D. Loftus, Willis George Emerson, W. W. Ayres, H. E. Ayres, W. J. Thomas, D. J. Hinkley, Charles James, Chulk Roberts, Robert Rendall, Henry C. Kerr, George Engle, James Ward, J. L. D. Walp, T. J. Turner, Fred E. Windsor, M. J. Corey, P. W. Cypher, G. W. Wainer, Cheud Burnes, W. H. Truzer, David Ishman, Ash Seince, Frank Provost, Samuel Murshback, H. R. Crozier, J. M. Robertson, P. C. Tulyer, Henry Greenleaf, R. M. Cook, I. W. Alexander, J. W. Swartzhammer, Henry Bamada, E. M. Ayres, John W. Burdelle, Walter Baun and E. M. Scott,

Defendants.

Amended Bill [of Complaint].

To the Judges of the Circuit Court of the United States for the Southern District of California.

Edmund Burke, a citizen and resident of the State of California, brings this his Bill of Complaint against the above-named defendants. And thereupon your orator complains and says:

1. That at all times hereinafter mentioned, the

defendant, The Southern Pacific Railroad Company, was and is a corporation, created and existing pursuant to the laws of the State of California, and had and has its principal office at the City of San Francisco, in the State of California.

2. That The Kern Trading and Oil Company, for the last five years has been, and now is a corporation created and existing [5] pursuant to the laws of the State of California, and has its principal office at the city of San Francisco, in the State of California, and always has been, and now is wholly owned, dominated, controlled and operated by The Southern Pacific Railroad Company, for the ulterior purpose of doing certain things which, by law, the said The Southern Pacific Railroad Company is prohibited from doing, to wit: Mining for petroleum and other minerals, and dealing with the same as a commodity, and claiming, for the benefit of The Southern Pacific Railroad Company, as an alleged lessee of the said Southern Pacific Railroad, the certain prohibited and interdicted mineral lands hereinafter referred to; the said The Kern Trading and Oil Company does the things and makes the illegal claims and demands hereinafter set forth, against the complainant, and the lands herein described, and all of which is to the prejudice and damage of this complainant, as hereinafter appears and is set forth.

3. That the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of all of Sections 11, 13, 23, 33, Township 19 South, Range 15 East, M. D. B. & M., Fresno County, California, and all of Section 5 in

Township 20 South, Range 15 East, M. D. B. & M., Fresno County, California, as placer mining claims, under the mining laws of the United States, to the extent of one-tenth (1/10) undivided interest in each and all of the same.

4. That all of the above-described lands were known mineral lands and have been subject to location under the mining [6] laws of the United States and under the local rules, customs and usages prevailing in the State of California, and the Mining District in which said lands are situate, since the 1st day of January, 1865.

5. That all of the same, and each and every legal subdivision thereof, now is and at all times has been mineral land of great value, containing minerals in commercial quantities, and all of which was known to the above-named defendant, The Southern Pacific Railroad Company, its agents, officers and servants, since prior to the 1st day of January, 1865.

6. That on July 27th, 1866, the Congress of the United States passed a certain act making a grant of the public lands of the United States to the defendant, The Southern Pacific Railroad Company, and that Section 3 of said Act of July 27th, 1866, is in the words and figures as follows, to wit:

“SECTION 3. And be it further enacted, that there be and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph lines to the Pacific Coast, and to secure the safe and speedy transportation of mails, troops, and

munitions of war and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections of land per mile on each side of said railroad, whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is [7] designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, all under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; provided further, that the Railroad Company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate, and associate with said Company, upon the terms named in the 1st and 17th sections of this Act; provided, further, that all mineral lands be, and the same are hereby excluded from the operations of this Act, and in lieu thereof, a like

quantity of unoccupied and unappropriated agricultural lands in odd numbered sections, nearest to the line of said railroad, and within twenty miles thereof, may be selected as above provided. And provided, further, that the word 'mineral' when it occurs in this Act, shall not be held to include iron and coal. And provided, further, that no money shall be drawn from the treasury of the United States to aid in the construction of the said Atlantic and Pacific Railroad."

7. And your orator further says that Section 18 of said Act is in the words and figures following, to wit: [8]

"SECTION 18. And be it further enacted, that The Southern Pacific Railroad Company, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this Act, at such point near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have uniform gauge and rate of freight and of fare with said road; and in consideration thereof to aid in its construction shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

And that a construction and interpretation of Sec-

tions 3 and 18 of said Act, and of all acts and joint resolutions amendatory thereof, and supplemental thereto, covering and embracing the lands herein described, is involved in this suit and requires the construction of the Court.

8. That thereafter, and by virtue of a joint resolution of Congress, approved June 28th, 1870, certain conditions were expressly imposed and prescribed, by and under which said railroad and telegraph lines should be constructed and under what terms and conditions and limitations, patents should be issued by the Secretary of the Interior to defendant, The Southern Pacific Railroad Company, for said granted lands, and said joint resolution was, and is, in the words and figures as follows, to wit:

“BE IT RESOLVED by the Senate and the House of Representatives of the United States of America in Congress assembled, That The Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed [9] by said Company in the Department of the Interior on the third day of January, Eighteen Hundred and Sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the Company to the Secretary of the Interior, he shall direct an examination of each such Section of Commissioners to be appointed by the President, as provided in the act, making a grant of said Company, approved July twenty-seventh, Eighteen

Hundred and Sixty-six, and upon the report of the Commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said Company for the sections of land coterminus to each constructed section reported on as aforesaid, to the extent and amount granted to said Company by the said Act of July 27th, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said Act, approved June 18th, 1870."

9. That on July 10th, 1894, a patent purporting to convey certain lands, yet excepting and excluding the above described lands, issued from the United States to The Southern Pacific Railroad Company, and was accepted by the said The Southern Pacific Railroad Company, and recorded in the office of the Recorder of the County of Fresno, in the State of California, on the — day of —, 1894, by said The Southern Pacific Railroad Company; that attached hereto is a copy of said alleged patent, marked Exhibit "A," omitting only the description of other lands not involved herein, and which is hereby referred to and made a part of this bill. [10]

10. That prior to the 9th day of July, 1892, all of the said lands mentioned and described herein were covered by valid subsisting mining locations made theretofore by divers citizens of the United States, pursuant to the mining laws of the United States, and

said several and divers mining locations were made by said divers citizens of the United States after a discovery of mineral on each of said mining claims embraced therein and at the time of the issuance of said alleged patent were not public lands subject to sale and disposal, or within the jurisdiction of the Interior Department of the United States, and said lands were not the property of the United States, and not within the power of the United States to dispose of the same, but were segregated from the public domain, the beneficial title thereto being in said mining locators, and the legal title thereto being held in trust by the United States for said locators, or for their successors, heirs or assigns.

11. That all of said mining locations, prior to the issuance of said patent, and prior to the application of the said The Southern Pacific Railroad Company for patents, as hereinafter set forth, had been duly recorded in the office of the Recorder of the Mining District of Coalinga, in the County of Fresno, in the State of California, of all of which the said The Southern Pacific Railroad Company, its officers, agents and servants had due notice; that said Coalinga Mining District had been organized theretofore in pursuance to law, and was the proper place for record of said mining locations, of all of which the said The Southern Pacific Railroad Company had had knowledge prior to the issuance of said alleged patent.

12. That notwithstanding said knowledge and notice, and notwithstanding that the said The Southern Pacific Railroad Company, its officers, agents and

servants, well knew all the lands [11] herein described were mineral lands, and lands on which there were valid subsisting mining locations of record as aforesaid, and that the said The Southern Pacific Railroad Company was not entitled to a grant of the same, and that the said lands were precluded from the operation of said grant, the said The Southern Pacific Railroad Company did falsely and corruptly cause one Jerome Madden, its then land agent, on or about the 9th day of May, 1892, to make, and he did make, the certain false, wicked, corrupt and fraudulent affidavit and application in manner following, that is to say:

“STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.

I, JEROME MADDEN, being duly sworn, depose and say that I am the land agent of the Southern Pacific Railroad Company; that the foregoing lists of land which I hereby select, is a correct list of a portion of the public lands claimed by the said Southern Pacific Railroad Company, as inuring to it, to aid in the construction of the railroad of said Company, from a point in the northeast quarter of Section 2, Township 19 South, Range 20 East, M. D. B. & M. to Alcalde, for which a grant of lands was made by the Acts of Congress approved July 27, 1866, July 25, 1868, and June 28, 1870, as aforesaid, and that said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant, being within the limits

of twenty miles on each side of the line of route for a continuous distance of forty 559/1000 miles, being for the 9th and 17th sections of said road, starting from a point in the northeast quarter Section 2, Township 19 South, Range 20 East, M. D. B. & M., and ending at a point in the northeast quarter Section 23, Township [12] 21 South, Range 14 East, M. D. B. & M.

(Signed) JEROME MADDEN.

Sworn to and subscribed before me this 9th day of May, 1892.

Witness my hand and notarial seal.

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, in the State of California."

13. That thereafter, and pursuant to said affidavit so made as aforesaid, for the purposes aforesaid, there was issued to The Southern Pacific Railroad Company the alleged patent hereinbefore referred to.

14. That on the — day of —, 1894, the Honorable G. W. Lamoreaux, Commissioner of the General Land Office, and Honorable Hoke Smith, Secretary of the Interior, approved said application, but therein it was expressly provided that there should be excluded from the approval, and from the transfer in the patent that was to issue:

"All mineral lands should any such be found in the tracts aforesaid, but the exception, according to the terms of the statute was not to be construed to include iron and coal."

15. And thereupon the said alleged patent issued as aforesaid.

16. Your orator further says and shows unto your Honors that the defendant, The Southern Pacific Railroad Company, did assent to all of the terms and conditions of said Act of Congress, approved July 27th, 1866, and the joint resolution of June 28th, 1870, and they did wholly submit to and accept the terms and [13] conditions of said Acts, and did agree that The Southern Pacific Railroad Company, and its assigns and successors and all persons then or now in privity with it, should recognize, respect and be held by the reservation, exception and exclusion of all mineral lands contained in said grant, and that such alleged patent containing such exclusion, exception and reservation did not convey to the said defendant, The Southern Pacific Railroad Company, the lands hereinbefore described, or any part thereof, and that said exception, exclusion and reservation was a term of description which was accepted by the said The Southern Pacific Railroad Company at the time of the issuance of said patent.

17. That the lands in controversy are not within the limits of twenty miles of the line of the railroad of said defendant, The Southern Pacific Railroad Company, and are not *coterminus* with any completed twenty-five mile section of the line of railroad of said The Southern Pacific Railroad Company, and that the railroad, to aid in the construction of which said grant of lands was made, has never been completed, and that all the lands herein described lie opposite to and *coterminus* with an uncompleted twenty-five mile section of said railroad; and in respect to this subject, your orator alleges that a con-

struction by this Court of Sections 4 and 6 of the said Act of July 27th, 1866, is involved. Your orator alleges that said patent was issued without jurisdiction on the part of the Land Office of the United States and in contravention of Section 4 of said Act of July 27th, 1866, and said lands were certified and approved by the Secretary of the Interior, and said alleged patent issued, wholly without authority of law and in contravention of Section 7 of the Act of March 3d, 1887, and a construction of which Act last aforesaid is involved in this suit.

18. Further reiterating all the foregoing allegations, complainant alleges that said grant and patent did not convey said [14] sections, or any part thereof, and said patent to the said The Southern Pacific Railroad Company was issued by the United States, and accepted by the said The Southern Pacific Railroad Company with said exception and reservation, expressly excepting, precluding and excluding all mineral lands that might at any time be found therein, and that the said The Southern Pacific Railroad Company accepted the same with such exception and reservation. And your orator further alleges that at the time of the making of said grant, and the issuance of said patent, and prior thereto, and ever since, said lands and sections, and each legal subdivision thereof, were mineral and not agricultural in their character, and that the same was a fact at all of said times of common and current observation, and known to the said The Southern Pacific Railroad Company at all the times herein mentioned, and that, as your orator is informed and believes, and

therefore avers, prior to the issuance of said alleged patent, the said lands have been examined by the Department of the Interior, through its geological department, in manner and form of law, and determined to be mineral lands, and not agricultural in their character, and more valuable for mining than for agricultural purposes.

19. That prior to the 10th day of July, 1894, and subsequent to the 1st day of November, 1891, and on or about the 22d day of May, 1892, the said The Southern Pacific Railroad Company made the application for patents herein referred to, to the Secretary of the Interior, for said sections of land under said Congressional Act, as alleged in the said petition therefor, and for all of the said sections of the public land as therein set forth, and on July 10th, 1894, the said The Southern Pacific Railroad Company received and accepted from the United States, and caused to be recorded in the Office of the Recorder in the County of Fresno, the certain patent as hereinbefore stated, and the said [15] The Southern Pacific Railroad Company under said patent does now assert ownership in fee to each and every legal subdivision thereof, but has never been at any time, or now is in the actual, open, peaceable, notorious, public, and physical possession of any part of the same, and neither at the time of the commencement of this action, nor at any other time were any of the defendants in the actual, open, peaceable, notorious, public and physical possession of the same, or any part of the same, but at all times, since the making of said grant of July 27th, 1866, the said lands have

been wild, open, unoccupied, unappropriated lands, free from any physical sign of any claim of domination or ownership by any of the defendants herein.

20. And your orator further alleges that at no time did the locators of said mining lands, who made mining locations on the same prior to the 10th day of July, 1894, receive notice of the said application of the said The Southern Pacific Railroad Company for said patent, and there was no notice of hearing in the Land Office, and no opportunity was given to the said locators, or any of them, to contest the application of the said The Southern Pacific Railroad Company for a patent to said land as aforesaid, and there was no hearing in the Land Office, or in the Department of the Interior, to determine the mineral or agricultural character of any of the legal subdivisions of the land herein described, and that the said patent issued without any such determination, and said patent expressly reserving the determination of the quality of said lands for the subsequent consideration of a court of equity having jurisdiction over the subject matter of the same. And the said patent issued while the said mining locations and claims were in full force and effect and constituting a segregation, exception and reservation of the lands herein described and so located and claimed as aforesaid, [16] and at a time when the locators and claimants were the possessory owners of the same, and all of said lands, and each and every part of the same, were at said time within six miles of divers other mining locations, made pursuant to the mining laws of the United States, all of which facts

were then well known to the officers, servants and agents of said The Southern Pacific Railroad Company, and especially to the land agent of the said defendant Railroad Company, and to the said The Southern Pacific Railroad Company, and especially was it known to the said The Southern Pacific Railroad Company, and to its said land agent, that said sections of the public land herein described were not agricultural in character, or more valuable for agricultural than for mining purposes, or that they were of the character contemplated by the said grant to be passed to the said The Southern Pacific Railroad Company, and that all of the same were subject to and covered by valid subsisting mining locations, made by divers qualified locators under the mining laws of the United States, and were within six miles of divers other mining locations on public lands, all of which facts were then knowingly, falsely, fraudulently and corruptly withheld by the said The Southern Pacific Railroad Company, its officers, agents and servants, from the knowledge of the officers of the Land Department of the United States, for the purpose of deceiving the officers of the Land Department of the United States in relation to the mineral and nonagricultural character of said lands, and of the valid and subsisting mining locations thereon as aforesaid. And by reason of the said false, fraudulent and corrupt representations by said persons, and in the manner aforesaid, that said applied for sections of the said land were nonmineral, and agricultural in their character, and that there were no mining locations within six miles of any of

said lands, or upon any of the said lands, said patent was [17] issued by the officers of the Land Department of the United States, in ignorance of the facts, said officers having been deceived by said false and fraudulent representations of the said The Southern Pacific Railroad Company as aforesaid, that said sections were mineral nonagricultural in their character, and of the character contemplated by the grant, as passing to said The Southern Pacific Railroad Company, and more valuable for mining than for agricultural purposes, and were covered by valid and subsisting mining locations, made pursuant to the mining laws of the United States prior to the time of said *ex parte* application of the said The Southern Pacific Railroad Company for a patent thereto, or were within six miles of other valid and subsisting mining locations made on the public lands of the United States, pursuant to the mining laws of the United States, and that at the time of the making of such application for said patent as aforesaid, each quarter section of all of the said sections were, to the knowledge of the said The Southern Pacific Railroad Company, covered by valid subsisting mining locations, made pursuant to the mining laws of the United States, by divers of the above-named defendants, who received no actual or constructive notice of the said false and surreptitious application of the said The Southern Pacific Railroad Company for said patents to said lands, and there was at no time any hearing in the Department of the Interior to determine the mineral or agricultural character of said lands in said sections, of which

said locators of the same or their successors in interest or privies, or assigns or heirs, or representatives, had any actual or constructive notice or knowledge.

21. Reiterating all the foregoing allegations, complainant alleges that the said The Southern Pacific Railroad Company now claims the fee to said sections by reason of the issuance to it of said patent under said grant, which in fact did not convey [18] the said sections to the said defendant Railroad Company, but which in express terms of description conveyed only such alternate odd numbered sections of the public land not mineral, except as to coal and iron, to the amount of ten alternate sections per mile on each side of said railroad on the line thereof nearest to the line of said road and within twenty miles thereof, to be built, maintained and operated by said defendant Railroad Company, between the city of San Francisco and the point of connection with the Atlantic and Pacific Railroad Company near the eastern boundary line of the State of California, which were not sold, reserved, or otherwise disposed of, or to which mining claims had not attached, and yet excluding and excepting all mineral lands, should any such be found in said lands so described in said patent. And which said sections so named as aforesaid were at such time located and claimed mineral lands, and reserved by law from sale or disposal as aforesaid. And this complainant alleges that said patent is null and void, in so far as the claim of title to said sections, or any part thereof, under said patent is asserted by the said The

Southern Pacific Railroad Company, or by The Kern Trading and Oil Company, but that said sections above referred to were reserved, excepted and precluded from the operation of said grant and patent, and that, upon the dates in March, 1909, as hereinafter appears, the said sections were mineral lands of the United States, open to exploration, location, purchase and sale, and that at said time said lands, after examination by the Department of the Interior had been determined and adjudged as mineral lands, bearing mineral in commercial quantities; that said sections are mineral lands, and have, since July 25th, 1866, been more valuable for mining than for agricultural purposes, and were, previous to March, 1909, formally designated by the Department of the Interior, [19] after complete and thorough geological examination, to be lands bearing petroleum in commercial quantities.

22. That on the 2d day of March, 1909, all of Sections 5, 11, 13, 23 and 33, as above described, were open to location under the mining laws *laws* of the United States, the said locators who had made prior locations thereon, having failed to perform, or commence the performance of their annual labor on each or any of the quarter sections thereof for the year 1908, and had not performed the same thereon up to the 3d day of March, 1909, when your complainant, together with the defendants, A. L. Frick, M. J. Frick, S. L. Phillips, E. Phillips, M. E. Wall, B. McGowan, E. M. Dunweadie, entered on said lands and made mining locations on each quarter section thereof, acting as an association of eight persons, pursu-

ant to the mining laws of the United States, and thereby succeeded to all the right, title and interest in and to the quarter section of said section, of the prior mining locators of the discoveries on which said prior mining locations were predicted, and all of said locations, or duplicates thereof, were duly filed in the office of the Recorder of the County of Fresno, in the State of California, on the 6th day of March, 1909.

23. That contemporaneous with the making of said relocations there was a discovery of mineral on each of said locations by said relocators, and prior thereto said land had been properly and legally designated by the Department of the Interior, as lands bearing mineral in commercial quantities, and more valuable for mining than for agricultural purposes.

24. That the said defendants, in addition to the foregoing, claim to have some right, title or interest, in or to said sections, or to some portion thereof, adverse to complainant, but all of the claims of the said defendants, and each of them, are legally invalid, and said defendants have not, either jointly or severally, any legal right, title or interest in and to said [20] section or any part thereof, or in or to any part of the said mining claims now subsisting on the said sections hereinbefore described.

25. That said patent constitutes a cloud on the title of your complainant in and to the above-described land.

26. That the reasonable and market value of each of the said mining claims is upwards of Sixty Thousand Dollars, and that the reasonable and market value of the undivided interest of your orator in each

of said mining claims is upwards of Six Thousand Dollars.

27. That irrespective of, and independent of the lands and mining claims described herein, the said The Southern Pacific Railroad Company has elsewhere received from the United States, under said Congressional grant of July 27th, 1866, more land than it earned thereunder or was entitled to receive thereunder, along and coterminus with the line of its railroad as partially constructed between San Jose, California, to Tres Pinos, California, and from Alcalde, California, to Mojave, California, a distance comprising two hundred and fifty-two and four hundred and seventy-nine thousands of a mile, and thereby the lands herein described were not within the jurisdiction of the General Land Office at the date of said patent, the said Exhibit "A," to convey to said The Southern Pacific Railroad Company, and were precluded from passing thereby or thereunder.

WHEREFORE, your orator prays that a construction and interpretation be had by this Court of Sections 3 and 18 of said Act of Congress, approved July 27th, 1866, and the joint resolution of Congress authorizing, instructing and requiring the Secretary of the Interior of the United States to issue patents to The Southern Pacific Railroad Company, expressly prescribing what said patent should and should not contain, approved June 28th, 1870, and a final order and decree that patent issue, together [21] with the reservation and exception therein contained.

2. That the defendants and each of them be

estopped from claiming any right, title, interest or estate in or to any of the lands involved in this suit.

3. That an interlocutory injunction issue by this Court against each and all of the defendants herein, and all the persons in privity with them, requiring each and all of them to desist from any interference with the property in dispute, claimed herein by your orator, or the minerals therein until the final determination of this suit, and that at that time said injunction be made perpetual.

4. That the complainant have such other and further order and relief as may be just and equitable.

5. That a writ of subpoena of the United States issue, directed to the defendants herein, commanding them on a certain day, and under a certain penalty, to be and appear in this court, and there to answer, without oath, the premises, and to stand by and abide such decree and order as may issue against them.

And further your orator sayeth not.

EDMUND BURKE,

In Pro. Per.

State of California,

County of Los Angeles.

Edmund Burke, being duly sworn, deposes and says that he is the complainant above named; that he has read the foregoing bill, and knows the contents thereof; that the same is true, of his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters, he believes them to be true.

EDMUND BURKE.

Subscribed and sworn to before me, this 26th day of September, 1910.

[Seal]

J. S. McKNIGHT,

Notary Public.

Notary Public in and for the County of Los Angeles,
State of California. [22]

Exhibit "A."

PATENT.

**TO ALL TO WHOM THESE PRESENTS
SHALL COME, GREETING:**

WHEREAS by the Act of Congress approved July 27, 1866, and Joint Resolution of June 28, 1870, "to aid in the construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast" and to secure to the Government the use of the same for Postal, Military and other purposes, authority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the State, to construct a Railroad and Telegraph Line, under certain conditions and stipulations expressed in said Act, from the City of San Francisco to a point of connection with the Atlantic and Pacific Railroad near the boundary line of said State, and provision is made for granting to the said Company, "every alternate section of public land designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said Railroad, on the line thereof, and within the limits of twenty miles on each side of said road" "not sold, reserved, or otherwise disposed of by the United States, and to which

pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.”

AND WHEREAS, Official statements from the Secretary of the Interior, have been filed in the General Land Office, showing that the Commissioners appointed by the President under the provisions of the fourth section of the said Act of July 27, 1866, have reported to him, that the line of said railroad and telegraph from San Jose to Tres Pinos and from Alcalde to Mojave, together comprising two hundred and fifty-two miles and four hundred and seventy-nine thousandths of a mile has been constructed and fully completed and equipped in the manner prescribed by said Act of July 27, 1866, and accepted by the President. [23]

AND WHEREAS the following tracts have been duly listed under the Act aforesaid by the duly authorized land agent of the said Southern Pacific Railroad Company, as shown by his original lists of selections approved by the local officers and on file in this office.

AND WHEREAS the said tracts of land lie *co-terminus* to the constructed line of said road and are particularly described as follows, to wit:

South of base line and East of Mt. Diablo Meridian, State of California.

Township Nineteen, Range Fifteen.

All of Section 33 containing 640 acres.

(With other land.)

The said tracts as described in the foregoing make the aggregate area of 440,900.85 acres,

NOW, KNOW YE, that the United States of America, in consideration of the premises and pursuant to the said Acts of Congress, Have Given and Granted and by these presents do give and grant unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing. Yet excluding and excepting "All Mineral Lands," should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the Statute, shall not be constructed to include "Coal and Iron Lands."

TO HAVE AND TO HOLD the same with the appurtenances unto the said "Southern Pacific Railroad Company" and to its successors and assigns forever.

IN TESTIMONY WHEREOF, I, GROVER CLEVELAND, President of the United States, have caused these letters to be made patent and the Seal of the General Land Office to be hereunto affixed.
[24]

Given under my hand at the City of Washington, this the Tenth day of July in the year of our Lord One Thousand Eight Hundred and Ninety-four and the Independence of the United States, the one hundred and nineteenth.

By the President: GROVER CLEVELAND.

[Seal]

M. McKEAN,

Secretary.

L. Q. LAMAR,

Recorder of the General Land Office.

Recorded in Vol. 14, pp. 103 to 142, inclusive.

Patent No. 22.

Recorded Feb. 16, 1895, at 8:27 o'clock A. M., in Vol. P. of Patents, page 288 et seq., Fresno County Records.

[Endorsed]: In Equity—No. 192. United States Circuit Court, Southern District of California, Northern Division. Edmund Burke et al., Complainant, vs. The Southern Pacific Railroad Company et al., Defendants. Amended Bill. Original. Filed Oct. 31, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Edmund Burke, in Pro. Per. 616-17 Central Bldg., Los Angeles, California. [25]

**[Cross-Bill of Complaint of John I. Lamprecht and
F. M. Aiken.]**

*In the Circuit Court of the United States, in and for
the Southern District of California, Northern
Division.*

IN EQUITY—Number 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,
The Kern Trading and Oil Company, Thomas
W. Newlin, W. H. Layson, N. W. Spaulding,
F. D. Culver, C. F. Bassett, Henry C. Bunker,
Mary Ann Haddon, A. R. Cotton, Daniel E.
Rayes, E. M. Root, Jarvis L. Doyle, E. N.
Richardson, Hattie E. Miner, Helen Pollock,
George A. Doyle, B. Block, Loretta B. Hart,

Annie M. Fassett, Merrill D. Evans, William Miner, J. V. Ellis, Mary A. Hedden, Leonora J. Evans, Oregon Sanders, James Hedden, E. M. Redding, J. R. Manran, William Polloak, Joseph Hart, E. S. Payne, Mary J. Hilda, Albert Betz, A. L. Frick, M. J. Frick, S. L. Phillips, E. Phillips, M. E. Wall, E. N. Dunweedie, Barclay McGowan, John Doe, Richard Roe, Thomas Green, Henry Doe, James Doe, Edward Roe, Peter Doe, Dolly Doe, Frank Doe, Joseph Doe, Jacob Doe, Isaac Doe, Katy Doe, Harry Doe, Davis Doe, Duke Doe, Minnie Doe, Bunny Doe, Jerry Doe, McGowan Doe, Grant Doe, Platt Roe, George Morton, Jno. I. Lamprecht, and F. M. Aiken as Trustees, George D. Roberts, Q. L. Phelps, James Meynard, Jr., A. M. Anderson, T. S. Minot, Newton A. Johnson, David Ewing, D. M. Speed, Wm. Johnson, S. J. Gallagher, O. D. Loftus, Willis George Emerson, [26] W. W. Ayres, H. E. Ayers, W. J. Thomas, D. J. Hinkley, Charles James, Chulk Roberts, Robert Rendall, Henry C. Kerr, George Engle, James Ward, J. L. D. Walp, T. J. Turner, Fred E. Windsor, M. J. Corey, P. W. Cypher, G. W. Wainer, Choud Burnes, W. H. Truzer, David Ishman, Ash Seince, Frank Provost, Samuel Murshback, H. R. Crozier, J. M. Robertson, P. C. Tuyler, Henry Greenleaf, R. M. Cook, I. W. Alexander, J. W. Swartzhammer, Henry Bamada, E. M. Ayers, John W. Burdelle, Walter Baun and E. M. Scott,

Defendants.

To the Judges of the Circuit Court of the United States for the Southern District of California.

Your orators, John I. Lamprecht and T. M. Aiken, bring this their Cross-bill of Complaint against the above complainant and defendants, and thereupon your orators complain and say:

I.

That at all of the times hereinafter mentioned, the defendant, Southern Pacific Railroad Company, has been and is now a corporation created and existing pursuant to the laws of the State of California, having its principal office at the city of San Francisco, in the State of California.

II.

That the Kern Trading and Oil Company, for the last five (5) years, has been and is now a corporation created and existing pursuant to the laws of the state of California, having its principal office at the city of San Francisco, in the State of California, and during all of said time has been and now is [27] wholly owned, dominated, controlled and operated by the said Southern Pacific Railroad Company, for the ulterior purpose of doing certain things which the said Southern Pacific Railroad Company is prohibited by law from doing, to wit: mining for petroleum and other minerals, and buying, selling and dealing in the same as a commodity, and claiming for the benefit of the Southern Pacific Company, as its alleged lessee, the mineral lands hereinafter referred to, all of which is to the prejudice and damage of this *complaint*, as hereinafter appears and is set forth.

III.

That the following described lands, to wit:

All of Section 11, 13, 23 and 33, Township 19 South, Range 15 East, Mount Diablo Base and Meridian, and all of Section 5, Township 20 South, Range 15 East, Mount Diablo Base and Meridian, all situated in Fresno County, California;

are and have been since, to wit: the 1st day of January, 1865, known to be mineral lands of great value, containing mineral in paying quantities and more valuable for mining purposes than for any other purposes; all of which has been known to the Southern Pacific Company, its officers and agents, since, to wit: the 1st day of January, 1865, and to the defendant, The Kern Trading and Oil Company, its officers and agents, since the date of its creation.

IV.

That heretofore the Congress of the United States passed a certain Act, which was approved by the President of the United States, July 27th, 1866, making a grant of public lands of the United States to the defendant, Southern Pacific Railroad Company, and that Section 3 of said Act of Congress, is in the words and figures as follows, to wit: [28]

“Sec. 3. AND BE IT FURTHER ENACTED, That there be, and hereby is, granted to the Atlantic Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails,

troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the Office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: **PROVIDED**, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as [29] far as the routes are upon the same general line, the amount of land heretofore granted

shall be deducted from the amount granted by this act: PROVIDED FURTHER, That the railroad company receiving the previous grant of land may assign their interest to said 'Atlantic and Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: PROVIDED FURTHER, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: AND PROVIDED FURTHER, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: AND PROVIDED FURTHER, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.' "

V.

Your orators further say and show that Section 18 of said Act of Congress is in words and figures as follows, to wit:

"Sec. 18. AND BE IT FURTHER ENACTED, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near

the boundary line of the State *of the State* of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with [30] said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.”

VI.

Your orators further say and show that Section 4 of said Act of Congress is in words and figures as follows, to wit:

“Sec. 4. AND BE IT FURTHER ENACTED, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall

be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminus with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United [31] States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

VII.

Your orators further say and show that Section 6 of said Act is in words and figures as follows, to wit:

"Sec. 6. AND BE IT FURTHER ENACTED: That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, (b) and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this Act; but the provisions of the Act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen

hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. (c)"

VIII.

Your orators further say and show that thereafter the Congress of the United States passed a certain joint resolution, which was approved by the President of the United States on the [32] 20th day of June, 1870, which joint resolution is in words and figures as follows, to wit:

"BE IT RESOLVED, etc., That the Southern Pacific Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said

company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act (a).”

IX.

Your orators further say and show that prior to the 9th [33] day of May, 1892, all of said lands described in paragraph III of this Bill of Complaint were, except for the mining claims hereinafter mentioned, unappropriated public mineral lands of the United States and subject and open to location under the mining laws of the United States, and that prior to said 9th day of May divers citizens of the United States, did, pursuant to the mining laws of the United States and the rules, regulations, customs and usages then in force in the mining district in which said lands were situated, enter upon and locate, as placer mining ground, mining claims of one-quarter section each, all of said lands, after a discovery of mineral made by the locators thereof on each of said mining claims, and that all of said mining locations remained in full force and effect, uncanceled and unforfeited, from the date of their location as aforesaid, until, to wit: the 3d day of March, 1909, whereby all of said lands became and were and continued to be during all of said time, segregated from the public domain.

X.

That the Coalinga Mining District included within its boundaries all of the lands described in paragraph III of this Bill of Complaint, and was organized prior to the 9th day of May, 1892, and that all of said mining locations were duly recorded prior to the 9th day of May, 1892, in the office of the Recorder of said Mining District, which was the proper place for the recording of the same, according to the rules, regulations, customs and usages of the miners of said district; of all of which the said defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, their officers and agents, have at all times since the recording of the same had notice.

XI.

Your *orator* further say and show, that there was not, at [34] the time of the location of said mining claims as aforesaid, or at the time of the recording of the notice of said locations, as aforesaid, nor has there at any time since, been any rule, regulation, custom or usage of the miners of said Mining District, or any state or federal law, requiring the recordation in the United States Local Land Office at Visalia, California, or in the General Land Office at Washington, D. C., of notice of any mining location made within said Mining District, and that the Visalia Land Office for the Visalia Land District, wherein all of said lands are situated, has never at any time since its organization had or kept any record of mining claims located within said Land District, until such time as locators of such mining claims made application at said Local Land Office

for patents of lands covered by such mining claims; of all of which the said defendant, Southern Pacific Railroad Company, its officers and agents, and the officers and agents of the Interior Department of the United States, and all branches of said Department, have at all times herein mentioned had notice, and of all of which said The Kern Trading and Oil Company, and its officers and agents, have, at all times since the date of its creation, had notice.

XII.

Your *orator* further say and show that notwithstanding said knowledge and notice, and notwithstanding the said Southern Pacific Company, its officers and agents, well knew that all of the lands described in paragraph III of this Bill of Complaint were mineral lands, and lands on which there were valid, subsisting mining locations of record as aforesaid, and that the same had not been granted to the said Southern Pacific Railroad Company, and that it had no right to have or receive the said lands, and that the said lands were expressly excluded from the operations of its said grant, the said Southern Pacific Railroad Company did falsely, fraudently and corruptly cause one Jerome Madden, [35] its then land agent, on or about the 9th day of May, 1892, to make and file, and that he did make and file in the United States Local Land Office at Visalia, California, a certain false, wicked, corrupt and fraudulent affidavit and application for patents of certain lands, including, among others, the lands described in paragraph III of this Bill of Complaint, in manner and

form as follows, to wit:

“STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.

I, JEROME MADDEN, being duly sworn, depose and say that I am the land agent of the Southern Pacific Railroad Company; that the foregoing lists of land which I hereby select, is a correct list of a portion of the public lands claimed by the said Southern Pacific Railroad Company, as inuring to it, to aid in the construction of the railroad of said company, from a point in the northeast quarter of Section 2, Township 19 south, Range 20 East, M. D. B. & M. to *Alcade*, for which a grant of lands was made by the Acts of Congress approved July 27, 1866, July 25, 1868, and June 28, 1870, as aforesaid, and that said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant, being within the limits of twenty miles on each side of the line of route for a continuous distance of forty 559/1000 miles, being for the 9th and 17th sections of said road, starting from a point in the northeast quarter Section 2, Township 19 South, Range 20 East, M. D. B. & M. and ending at a point in the northeast quarter, [36] Section 23, Township 21 South, Range 14 East, M. D. B. & M.

(Signed) JEROME MADDEN.

Sworn to and subscribed before me this 9th

vs. The Southern Pacific Railroad Co. et al. 47

day of May, 1892. Witness my hand and notarial seal.

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, in the State of California."

And your *orator* allege and aver that said affidavit of said Madden, made and filed as aforesaid, was and is false, in that it states relative to all the lands included in the list to which it refers, that they were unappropriated and not interdicted mineral or reserved lands, while in fact the lands described in paragraph III of this Bill of Complaint, which were all included in said list, were, at the time of making and filing of said affidavit, appropriated as placer mining ground, and were all interdicted mineral and reserved lands.

XIII.

Your orators further say and show that prior to the 14th day of May, 1892, the defendant, Southern Pacific Railroad Company, made said *ex parte* application to the Interior Department of the United States, through the Local Land Office at Visalia, California, for patent to all of the lands described in the list of lands referred to in said affidavit made by said Jerome Madden as aforesaid, but did not in said application or otherwise ask to have the mineral or nonmineral character of said lands, or any thereof, determined before issuance of the patent which it sought in said *ex parte* application, and that thereafter, and on, to wit, the 14th day of May, 1892, the Register and Receiver of said Local Land Office

did certify that they had examined said list of lands and tested the accuracy thereof by the plats and records of their office; that they found the same to be correct; [37] that the filing of said list of lands was allowed and approved; that the whole of said lands were surveyed public lands of the United States and within the limits of twenty miles on each side of the line of said road, and that the same were not nor was any part thereof returned and denominated as mineral lands nor claimed as swamp lands, and that there was not any homestead pre-emption, State or other valid claim to any portion of said lands on file or on record in said Local Land Office.

XIV.

Your orators further say and show that thereafter, and prior to, to wit, the 27th day of June, 1894, the officers of the General Land Office examined said list of lands in connection *i* with the records and plats of that office, upon said *ex parte* application, and found, among other things, that said lands fell within the twenty mile lateral limits of said road, and that they were, so far as the records of the General Land Office shows, "free from conflict"; but your orator alleges and shows that the officers and agents of the Interior Department had not theretofore had, for the examination of said lands, sufficient opportunity to determine whether any or all of them were or were not mineral lands, or to justify a statement by them in the patent of the United States that said lands were nonmineral, and that neither the officers of the Local Land Office at Visalia, nor the officers of the General Land Office, ever found or determined that

any of said lands were nonmineral in character, or attempted to decide or did decide whether any of said lands were or were not mineral lands. And thereupon the then Commissioner of the General Land Office did, in conformity with the rulings and decisions of the Interior Department which were then in full force and effect, and which had obtained and been followed by the officers of that Department in such cases for many years, to wit, forty years recommend to the then Secretary of the Interior as follows, to wit: [38]

“It is hereby recommended that the tracts described,” (in said list) “covering 440,900.85 acres, be approved and carried into patent as the lands falling within the grant by the act aforesaid to the said Southern Pacific Railroad Company of California, excluding, however, from the approval and from the transfer in the patent that may be issued, ‘All Mineral Lands,’ should any such be found in the tracts aforesaid; but this exclusion according to the terms of the statute, ‘shall not be construed to include coal and iron.’

G. W. LAMOREAUX,
Commissioner.”

And your orators allege and show that said recommendation of said Commissioner of the General Land Office was thereupon approved by the then secretary of the Interior, in words and figures as follows, endorsed upon said recommendation, to wit:

“Approved: covering four hundred and forty

50 *J. I. Lamprecht and F. M. Aiken, Trustees,*
thousand, nine hundred and eighty-five hundredths of an acre.

HOKE SMITH, Secretary."

And your orators allege and show that there was no other further finding, determination, certification or recommendation made by any officer of the Interior Department at any time as to the character of any of the lands embraced in said list, and which were afterwards included in the alleged patent hereinafter mentioned, as to their being or not being mineral lands.

XV.

Your orators further say and show that thereafter and in pursuance of and in conformity with the said recommendation of the Commissioner of the General Land Office and said approval thereof by the said Secretary of the Interior, the officers of the Interior [39] Department who were charged by law with the duty of preparing and issuing patents to lands due to be issued by the United States, did, on, to wit, the 10th day of July, 1894, prepare, execute, issue and deliver to the said defendant, Southern Pacific Railroad Company, a certain alleged patent, a true copy of which, excepting only the descriptions of other lands not involved in this suit, is hereto attached, marked Exhibit "A," and made a part of this Bill of Complaint, wherein was set forth all of said list of lands listed by said the Southern Pacific Railroad Company for patent under said grant upon its said *ex parte* application, and that immediately following said list of lands in said patent is the entire

granting clause of said alleged patent, which is in words and figures as follows, to wit:

“NOW KNOW YE, That the United States of America, in consideration of the premises and pursuant to the acts of Congress, have given and granted, and by these presents do give and grant unto the Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of *of* land selected as aforesaid, and described in the foregoing.

Yet excluding and excepting ‘All Mineral Lands,’ should any such be found in the tracts aforesaid; but this exclusion and exception according to the terms of the statute shall not be construed to include ‘coal and iron lands.’

TO HAVE AND TO HOLD the same, with the appurtenances, unto the said Southern Pacific Railroad Company, and to its successors and assigns forever.” [40]

XVI.

Your orators further say and show to the Court that at no time during the pendency of said *ex parte* application for patent of said lands, was any notice, constructive or actual, given to any of the locators of said prior mining locations, of the application of the said Southern Pacific Railroad Company for patent to said lands, nor was there any publication of such notices, nor was there any hearing ordered or had in the Interior Department, or in any branch thereof, for the purpose of allowing any persons having mining claims or other claims on any of said lands, to be heard and have their rights in or to any

of said lands examined or determined, and said list of lands was certified as aforesaid, without any opportunity being given to any of said prior mining locators of any of said lands to be heard in defense of their rights to any of said lands under said mining locations, and the officers of the Land Department never acquired jurisdiction to conceal, and never did conceal, said mining locations, and never acquired jurisdiction otherwise to defeat or in any wise affect any rights of the locators thereof thereunder, and never attempted or presumed to or did molest or interfere in any way whatsoever with such rights.

XVII.

Your orators further say and show unto the Court that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to and submit to and agree to be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said Act and joint resolution, and said patent, or either or any of them, contained, and so accepting the same and assenting and submitting thereto and agreeing to be bound thereby, did receive and accept [41] said alleged patent and cause the same to be recorded in the office of the Recorder of the County of Fresno and State of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands, or any part thereof, under or through it by virtue of said Act of Congress and joint resolution and said patent, or

either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions, and reservations, and are in equity and in conscience estopped to resist or deny the binding force and effect of the same, or any part of any thereof.

XVIII.

Your orators further say and show that the lands described in paragraph III of this Bill of Complaint are not within the limits of twenty miles of any completed section of twenty-five consecutive miles of the line of the railroad of said defendant, Southern Pacific Railroad Company, and are not coterminous with any completed section of twenty-five consecutive miles of the line of the said railroad, and that the railroad to aid in the construction of which said grant of lands was made, has never been completed, and that all of the lands described in paragraph III of this Bill of Complaint lie opposite to and coterminous with an uncompleted section of twenty-five consecutive miles of said railroad line, and that prior to the certification of said list of lands and the issuance of said alleged patent as aforesaid, the said Southern Pacific Railroad Company had received from the United States, for the construction of its said railroad, land to the amount of more than ten alternate odd-numbered sections per mile for all the railroad it has ever constructed under its grant, and that said alleged patent was illegally issued, and was issued without any jurisdiction on the part of any officer of the United States, or any Department thereof, to issue the [42] same, and was issued in violation

and in contravention of the provisions of Section 4 of said Act of July 27th, 1866; and your orator alleges and avers that said recommendation of said list of lands for patent by the Commissioner of the General Land Office, and said approval thereof by said Secretary of the Interior, and the issuance of said alleged patent, were all wholly without authority of law and in contravention and violation of the 7th Section of the Act of March 3d, 1887, and that said certification and said alleged patent were and ever have been inoperative, void and of no effect.

XIX.

Your orators further allege and show that the lands described in paragraph III of this Bill of Complaint were, on, to wit, the 3d day of March, 1909, vacant, unappropriated public mineral lands belonging to the United States, except for the mining locations theretofore made thereon, as alleged in paragraph IX of this Bill of Complaint, and that on, to wit, the 3d day of March, 1909, no annual assessment work for the year of 1908 had been done or commenced on any of said prior mining claims, and said lands were open to re-location as placer mining grounds, and that on, to wit, the 3d day of March, 1909, this complainant, and A. L. Frick, N. J. Frick, S. L. Phillips, E. Phillips, M. E. Wall, B. McGowan and E. M. Dunweedie, acting as an association of eight persons, entered on said lands and relocated each quarter section thereof as placer mining ground, under and in accordance with the mining laws of the United States and the rules, regulations and customs

of miners in the district where said lands are situated, and posted upon each of said quarter sections so relocated the notice of such relocation required by law to be posted, and did thereafter and on, to wit, the 6th day of March, 1909, cause copies of each of said relocation notices to be [43] duly recorded in the office of the Recorder for the county of Fresno, State of California, which was then the proper and lawful place for the recordation of mining locations made within said county where said lands are situated, and did thereby succeed to all the right, title and interest of said prior mining locators in and to all of said lands and to the discoveries on which said prior mining locations were predicated.

XX.

That contemporaneous with the making of said relocations, there was a discovery of mineral by said relocators on each quarter section or one hundred and sixty acre tract of said land, and prior thereto said land had been properly and legally examined by the Department of the Interior and designated by it as lands bearing mineral in commercial quantities and more valuable for mining purposes than for any other purpose.

XXI.

You orators further say and show that said defendant, Southern Pacific Railroad Company, had never, prior to the beginning of this suit, been in actual, open, notorious, exclusive, continuous and hostile possession of any of said lands described in paragraph III of this Bill of Complaint.

XXII.

Your orators further alleges that, subject only to the paramount title of the United States, complainant is the owner and entitled to the possession of all the lands described in paragraph III hereof, as placer mining claims under the mining laws of the United States, to the extent of one-tenth ($1/10$) undivided interest in the whole thereof; that J. I. Lamprecht and F. M. Aiken, Trustees, are the owners in trust for the benefit of a large number of persons, firms and corporations, other than the said defendants, the Southern Pacific Railroad Company and [44] The Kern Trading and Oil Company, and are entitled to the possession of all of said lands described in paragraph III hereof, to the extent of an undivided nine-tenths ($9/10$) thereof, as placer mining claims, subject only to the paramount title of the United States.

XXIII.

Your orators further allege and show that said alleged patent constitutes a cloud upon the said title of your orators in and to said lands, and that the reasonable and market value of each of said mining claims is upwards of Sixty Thousand Dollars (\$60,000.00), and that the reasonable and market value of your orator's said undivided interest in each of said mining claims is upwards of Fifty Thousand Dollars (\$50,000.00).

XXIV.

Your orator further alleges and shows that the said defendants other than said J. I. Lamprecht and F. M. Aiken, Trustees, claim to have some right, title or

interest in or to said premises described in paragraph III hereof, or to some portion thereof, adverse to this complainant, but all such claims are illegal and invalid, and they have not, either jointly or severally, any right, title or interest in or to the same, or any part thereof, or in or to any part of the said mining claims now subsisting thereon,

WHEREFORE, your orators pray :

1st. That a construction and an interpretation be made by this Court in this suit of Section 3, 4, 6, and 18, of said Act of Congress approved July 27th, 1866, and of the joint resolution of Congress approved June 28th, 1870, and all the other Acts of Congress mentioned in this Bill of Complaint, in relation to their application to the facts and circumstances stated and alleged in this Bill of Complaint. [45]

2nd. That a construction and interpretation be made by this Court in this suit of the recommendation of the Commissioner of the General Land office for the certification and approval by the Secretary of the Interior of the said list of lands, and of the approval by the Secretary of the Interior of said recommendation as set forth and alleged in this Bill of Complaint, and also of said patent, including the claims in said alleged patent excepting and excluding all mineral lands from conveyance by said alleged patent.

3rd. That all of said defendants and said complainant be required to set forth the nature of their respective claims in and to the property described in paragraph III of this Bill of Complaint, and that all claims of said defendants and said complainant in or to said lands and said mining claims, adverse to your

orator, may finally be determined by decree of this Court in this suit.

4th. That it may be ordered, adjudged and decreed by this Court in this suit, that none of said defendants, except J. I. Lamprecht and F. M. Aiken, Trustees as aforesaid, have any right, title or interest in or to said lands described in paragraph III of this Bill of Complaint, or in any part thereof, or in or to said mining claims, or any thereof, and that they and each and all of them are, and that they be estopped from claiming any right, title or interest in or to the same, and that the complainant's title to said lands be quieted.

5th. That an interlocutory injunction in due form be issued by this Court, directed to each and all of the defendants herein, except the said defendants J. I. Lamprecht and F. M. Aiken, Trustees as aforesaid, commending them, and each of them, [46] and all other persons in privity with them, to refrain and desist from any interference with the property described in paragraph III of this Bill of Complaint, or the minerals therein, and from interfering with complainant's possession thereof, until the final determination of this suit, and that upon final hearing therein said injunction may be made perpetual.

6th. That your orator may have such other, further and different relief, order or decree, the premises being considered, as to the Court may seem just and equitable.

7th. That a writ of subpoena of the United States issue, directed to each of the defendants herein, commanding them, on a certain day and under a certain

penalty, to be and appear in this Court and there to answer without oath (the answer under oath being hereby expressly waived) the premises, and to stand by and abide the decree and order as may issue against them.

INGALL W. BULL,

Business Address: 616-17 Central Bldg., Los Angeles, Cal.

Of Counsel.

State of California,
County of Los Angeles,—ss.

Ingall W. Bull, being duly sworn, deposes and says that he is the attorney for the above named cases; that he has read the foregoing Bill, and knows the contents thereof; that the same is true, of his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters, he believes them to be true; that said case—complainants, all nonresidents of Los Angeles County and an absence therefrom.

INGALL W. BULL.

Subscribed and sworn to before me, this 31 day of Oct., 1910.

CORA E. MONTGOMERY, [Seal]
Notary Public, Los Angeles County, State of California. [47]

Exhibit "A."

PATENT.

**TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETING:**

WHEREAS by the Act of Congress approved

60 *J. I. Lamprecht and F. M. Aiken, Trustees,*
July 27, 1866, and Joint Resolution of June 28, 1870,
“to aid in the construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast” and to secure to the Government the use of the same for postal, Military and other purposes, *wuthority* is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the State, to construct a Railroad and Telegraph Line, under certain conditions and stipulations expressed in said Act, from the City of San Francisco to a point of connection with the Atlantic and Pacific Railroad near the boundary line of said State, and provision is made for granting to the said Company, “every slternate section of public land designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said Railroad, on the line thereof, and within the limits of twenty miles on each side of said road” “not sold, reserved, or otherwise disposed of by the United States, and to which pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.”

AND WHEREAS, Official statement from the Secretary of the Interior, have been filed in the General Land Office, showing that the Commissioners appointed by the President under the provisions of the fourth section of the said Act of July 27, 1866, have reported to him, that the line of said railroad and telegraph from San Jose to *Tre Pimos* and from *Alcalde* to *Mojave*, together comprising Two Hundred and Fifty Two miles and four hundred and seventy-nine thousandths of a mile has been con-

structed and fully [48] completed and equipped in the manner prescribed by said Act of July 27, 1866, and accepted by the President.

AND WHEREAS the following tracts have been duly listed under the Act aforesaid by the duly authorized land agent of the said Southern Pacific Railroad Company, as shown by his original lists of selections approved by the local officers and on file in this office.

AND WHEREAS the said tracts of land lie co-terminous to the constructed line of said road and are particularly described as follows, to wit:

South of base line and East of Mt. Diablo Meridian, State of California.

Township Nineteen, Range fifteen.

All of Section 33, containing 640 acres.

(With other land)

The said tracts as described in the foregoing make the aggregate area of 440,900.85 acres.

NOW, KNOW YE, that the United States of America, in consideration of the premises and pursuant to the said Acts of Congress, Have Given and Granted and by these presents do give and grant unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing. Yet excluding and excepting "All Mineral Lands," should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute, shall be constructed to include "Coal and Iron Lands."

TO HAVE AND TO HOLD the same with the

appurtenances unto the said "Southern Pacific Railroad Company" and to its successors and assigns forever.

IN TESTIMONY WHEREOF, I, GROVER CLEVELAND, President of the United States, have caused these letters to be made patent and the [49] Seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this the tenth day of July, in the year of our Lord one thousand eight hundred and ninety-four and the Independence of the United States, the one hundred and nineteenth.

By the President: GROVER CLEVELAND,
[Seal]

M. McKEAN,
Secretary.

L. Q. LAMAR,

Recorder of the General Land Office.

Recorded in Vol. 14, pp. 103 to 142, inclusive.

Patent No. 22.

Recorded Feb. 16, 1895, at 8:27 o'clock A. M., in Vol. P. of Patents, page 283 et seq., Fresno County Records.

[Endorsed]: No. 192. In the Circuit Court of the United States for the Southern District of California, Northern Division. In Equity. Edmund Burke, Complainant, vs. Southern Pacific Railroad Company et al., Defendants. Cross-bill of Complaint of J. I. Lamprecht and F. M. Aiken as Trustees, etc. Filed Oct. 31, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. I. W. Bull. Atty. for Cross-complainants, 616-617 Central Bldg., Los Angeles, Cal. [50]

*In the Circuit Court of the United States, in and for
the Southern District of California, Northern
Division.*

Number 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,
The Kern Trading and Oil Company, Thomas
W. Newlin, W. H. Layson, N. W. Spaulding,
F. D. Culver, C. F. Bassett, Henry C. Bunker,
Mary Ann Haddon, A. R. Cotton, Daniel E.
Rayes, E. M. Root, Jarvis L. Doyle, E. N.
Richardson, Hattie E. Miner, Helen Pollock,
George A. Doyle, B. Block, Loretta B. Hart,
Annie M. Fassett, Merrill D. Evans, William
Miner, J. V. Ellis, Mary A. Heddon, Leonara
J. Evans, Oregon Sanders, James Hedden,
EM. Redding, J. R. Manran, William Polloak,
Joseph Hart, E. S. Payne, Mary J. Hida,
Albert Betz, A. L. Frick, M. J. Frick, S. L.
Phillips, E. Phillips, M. E. Wall, E. N. Dun-
weddie, Barclay McGowan, John Doe, Richard
Roe, Thomas Green, Henry Doe, James Doe,
Edward Roe, Peter Doe, Dolly Doe, Frank
Doe, Joseph Doe, Jacob Doe, Isaac Doe, Katy
Doe, Harry Doe, Davis Doe, Duke Doe, Min-
nie Doe, Bunny Doe, Jerry Doe, McGowan
Doe, Grant Doe, Platt Roe, George Morton,
Jno. I. Lamprecht, and F. M. Aiken as Trus-
tees, George D. Roberts, Q. L. Phelps, James

Meynard, Jr., A. M. Anderson, T. S. Minot, Newton A. Johnson, David [51] Ewing, D. M. Speed, Wm. Johnson, S. J. Gallagher, O. D. Loftus, Willis George Emerson, W. W. Ayres, H. E. Ayres, W. J. Thomas, D. J. Hinkley, Charles James, Chulk Roberts, Robert Rendall, Henry C. Kerr, George Engle, James Ward, J. L. D. Walp, T. J. Turner, Fred E. Windsor, M. J. Corey, P. W. Cypher, G. W. Wainer, Choud Burnes, W. H. Truzer, David Ishman, Ash Seince, Frank Provost, Samuel Murshback, H. R. Crozier, J. M. Robertson, P. C. Tuyler, Henry Greenleaf, R. M. Cook, I. W. Alexander, J. W. Swartzhammer, Henry Bamada, E. M. Ayers, John W. Burdelle, Walter Baun and E. M. Scott,

Defendants.

**Answer of J. I. Lamprecht and F. M. Aiken as
Trustee, etc., to Amended Bill.**

To the Judges of the Circuit Court of the United States for the Southern District of California.

Now comes the above-named defendants J. I. Lamprecht and F. M. Aiken and answering the Amended Bill of Complaint herein allege:

I.

That at all of the times hereinafter mentioned, the defendant, Southern Pacific Railroad Company, has been and is now a corporation created and existing pursuant to the laws of the State of California, having its principal office at the city of San Francisco, in the State of California.

II.

That The Kern Trading and Oil Company, for the last five (5) years, has been and is now a corporation created and existing [52] pursuant to the laws of the State of California, having its principal office at the city of San Francisco, in the State of California, and during all of said time has been and now is wholly owned, dominated, controlled and operated by the said Southern Pacific Railroad Company, for the ulterior purpose of doing certain things which the said Southern Pacific Railroad Company is prohibited by law from doing, to wit, mining for petroleum and other minerals, and buying, selling and dealing in the same as a commodity, and claiming for the benefit of the Southern Pacific Company, as its alleged lessee, the mineral lands hereinafter referred to, all of which is to the prejudice and damage of this *complaint*, as hereinafter appears and is set forth.

III.

That the following described lands, to wit:

All of Section 11, 13 23 and 33, Township 19 South, Range 15 East, Mount Diablo Base and Meridian, and all of Section 5, Township 20 South, Range 15 East, Mount Diablo Base and Meridian, all situated in Fresno County, California;

are and have been since, to wit, the 1st day of January, 1865, known to be mineral lands of great value, containing mineral in paying quantities and more valuable for mining purposes than for any other purposes; all of which has been known to the Southern Pacific Company, its officers and agents, since, to wit, the 1st day of January, 1865, and to the

defendant, The Kern Trading and Oil Company, its officers and agents, since the date of its creation.

IV.

That heretofore the Congress of the United States passed a certain Act, which was approved by the President of the United States, July 27th, 1866, making a grant of public lands of the United States to the defendant, Southern Pacific Railroad Company, [53] and that Section 3 of said Act of Congress is in the words and figures as follows, to wit:

“Sec. 3. AND BE IT FURTHER ENACTED, That there be, and hereby is, granted to the Atlantic Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the said United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office

of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: **PROVIDED**, That if said route shall be found upon the line of any other railroad [54] route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act; **PROVIDED, FURTHER**, That the railroad company receiving the previous grant of land may assign their interest to said 'Atlantic and Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: **PROVIDED FURTHER**, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided; **AND PROVIDED**

FURTHER, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: AND PROVIDED FURTHER, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.' "

V.

Your orators further say and show that Section 18 of said Act of Congress is in words and figures as follows, to wit:

"Sec. 18. AND BE IT FURTHER EN-ACTED, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall [55] have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

VI.

Your *orator* further say and show that Section 4 of said Act of Congress is in words and figures as follows, to wit:

"Sec. 4. AND BE IT FURTHER EN-

ACTED, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine, the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminus with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United [56] States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

VII.

Your orators further say and show that Section

6 of said Act is in words and figures as follows, to wit:

“Sec. 6. AND BE IT FURTHER EN-ACTED: That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, (b) and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this Act; but the provisions of the Act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled ‘An act to secure homesteads to actual settlers on the public domain,’ approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company (c).”

VIII.

Your orators further say and show that thereafter the Congress of the United States passed a certain joint resolution, which was approved by the President of the United States on the 28th day of June, 1870, which joint resolution is in words and [57] figures as follows, to wit:

“BE IT RESOLVED, etc., That the Southern Pacific Company of California may construct its road and telegraph line, as near as may be, on

the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act (a).''

IX.

Your orators further say and show that prior to the 9th day of May, 1892, all of said lands described in paragraph III of this Bill of Complaint were, except for the mining [58] claims hereinafter mentioned, unappropriated public mineral lands of the

United States and subject and open to location under the mining laws of the United States, and that prior to said 9th day of May, divers citizens of the United States, did, pursuant to the mining laws of the United States and the rules, regulations, customs and usages then in force in the mining district in which said lands were situated, enter upon and locate, as placer mining ground, mining claims of one-quarter section each, all of said lands, after a discovery of mineral made by the locators thereof on each of said mining claims, and that all of said mining locations remained in full force and effect, uncanceled and unforfeited, from the date of their location as aforesaid, until, to wit, the 3d day of March, 1909, whereby all of said lands became and were and continued to be during all of said time, segregated from the public domain.

X.

That the Coalinga Mining District included within its boundaries all of the lands described in paragraph III of this Bill of Complaint, and was organized prior to the 9th day of May, 1892, and that all of said mining locations were duly recorded prior to the 9th day of May, 1892, in the office of the Recorder of said Mining District, which was the proper place for the recording of the same, according to the rules, regulations, customs and usages of the miners of said district; of all of which the said defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, their officers and agents, have at all times since the recording of the same had notice.

XI.

Your orators further say and show, that there was not, at the time of the location of said mining claims as aforesaid, or at the time of the recording of the notice of said locations as aforesaid, nor has there at any time since, been any rule, regulation, [59] custom, or usage of the miners of said Mining District, or any State or federal law, requiring the recordation in the United States Local Land Office at Visalia, California, or in the General Land Office at Washington, D. C., of notice of any mining location made within said Mining District, and that the Visalia Land Office for the Visalia Land District, wherein all of said lands are situated, has never at any time since its organization had or kept any record of mining claims located within said Land District until such time as locators of such mining claims made application at said Local Land Office for patents of lands covered by such mining claims; of all of which the said defendant, Southern Pacific Railroad Company, its officers and agents, and the officers and agents of the Interior Department of the United States, and all branches of said Department, have at all times herein mentioned had notice, and of all of which said The Kern Trading and Oil Company, and its officers and agents, have, at all times since the date of its creation, had notice.

XII.

Your orators further say and show that notwithstanding said knowledge and notice, and notwithstanding the said Southern Pacific Company, its officers and agents, well knew that all of the lands de-

scribed in paragraph III of this Bill of Complaint were mineral lands, and lands on which there were valid, subsisting mining locations of record as aforesaid, and that the same had not been granted to the said Southern Pacific Railroad Company, and that it had no right to have or receive the said lands, and that the said lands were expressly excluded from the operations of its said grant, the said Southern Pacific Railroad Company did falsely, *fraudently* and corruptly cause one Jerome Madden, its then land agent, on or about the 9th day of May, 1892, to make and file, and that he did make and file in the United States [60] Local Land Office at Visalia, California, a certain false, wicked, corrupt and fraudulent affidavit and application for patents of certain lands, including, among others, the lands described in paragraph III of this Bill of Complaint, in manner and form as follows, to wit:

“STATE OF CALIFORNIA.

CITY AND COUNTY OF SAN FRANCISCO.

I, JEROME MADDEN, being duly sworn, depose and say, that I am the land agent of the Southern Pacific Railroad Company; that the foregoing lists of land which I hereby select, is a correct list of a portion of the public lands claimed by the said Southern Pacific Railroad Company, as inuring to it, to aid in the construction of the railroad of said company, from a point in the northeast quarter of Section 2, Township 19, South, Range 20 East, M. D. B. & M. to Alcade, for which a grant of lands was made by the Acts of Congress approved July

27, 1866, July 25, 1868, and June 28, 1870, as aforesaid, and that said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant, being within the limits of twenty miles on each side of the line of route for a continuous distance of forty 559/1000 miles, being for the 9th and 17th sections of said road, starting from a point in the northeast quarter Section 2, Township 19 South, Range 20 East, M. D. B. & M. and ending at a point in the northeast quarter Section 23, Township 21 South, Range 14 East, M. D. B. & M.

(Signed) JEROME MADDEN.

Sworn to and subscribed before me this 9th day of [61] May, 1892. Witness my hand and notarial seal.

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, in the State of California.”

And your *orator* allege and aver that said affidavit of said Madden, made and filed as aforesaid, was and is false, in that it states relative to all the lands included in the list to which it refers, that they were unappropriated and not interdicted mineral or reserved lands, while in fact the lands described in paragraph III of this Bill of Complaint, which were all included in said list, were, at the time of making and filing of said affidavit, appropriated as placer mining ground, and were all interdicted mineral and reserved lands.

XIII.

Your orators further say and show that prior to the 14th day of May, 1892, the defendant, Southern Pacific Railroad Company, made said *ex parte* application to the Interior Department of the United States, through the Local Land Office at Visalia, California, for patent to all of the lands described in the list of lands referred to in said affidavit made by said Jerome Madden as aforesaid, but did not in said application or otherwise ask to have the mineral or non-mineral character of said lands, or any thereof, determined before issuance of the patent which it sought in said *ex parte* application, and that thereafter, and on, to wit, the 14th day of May, 1892, the Register and Receiver of said Local Land Office did certify that they had examined said list of lands and tested the accuracy thereof by the plats and records of their office; that they found the same to be correct; that the filing of said list of lands was allowed and approved; that the whole of said lands were surveyed public lands of the United [62] States and within the limits of twenty miles on each side of the line of said road, and that the same were not nor was any part thereof returned and denominated as mineral lands nor claimed as swamp lands, and that there was not any homestead pre-emption, State or other valid claim to any portion of said lands on file or or record in said Local Land Office.

XIV.

Your orators further say and show that thereafter, and prior to, to wit, the 27th day of June, 1894, the officers of the General Land Office examined said list

of lands in connection *i* with the records and plats of that office, upon said *ex parte* application, and found, among other things, that said lands fell within the twenty mile lateral limits of said road, and that they were, so far as the records of the General Land Office shows, "free from conflict"; but your orator alleges and shows that the officers and agents of the Interior Department had not theretofore had, for the examination of said lands, sufficient opportunity to determine whether any or all of them were or were not mineral lands, or to justify a statement by them in the patent of the United States that said lands were nonmineral, and that neither the officers of the Local Land Office at Visalia, nor the officers of the General Land Office, ever found or determined that any of said lands were nonmineral in character, or attempted to decide or did decide whether any of said lands were or were not mineral lands. And thereupon the then Commissioner of the General Land Office did, in conformity with the rulings and decisions of the interior Department which were then in full force and effect, and which had obtained and been followed by the officers of that Department in such cases for many years, to wit, forty years, recommend to the then Secretary of the Interior as follows, to wit: [63]

"It is hereby recommended that the tracts described," (in said list) "covering 440,900.85 acres, be approved and carried into patent as the lands falling within the grant by the act aforesaid to the said Southern Pacific Railroad Company of California, excluding, however,

from the approval and from the transfer in the patent that may be issued, 'All Mineral Lands', should any such be found in the tracts aforesaid; but this exclusion according to the terms of the statute 'shall not be construed to include coal and iron.'

G. W. LAMOREAUX,
Commissioner."

And your *orator* allege and show that said recommendation of said Commissioner of the General Land Office was thereupon approved by the then Secretary of the Interior, in words and figures as follows, endorsed upon said recommendation, to wit:

"Approved: covering four hundred and forty thousand, nine hundred, and eighty-five hundredths of an acre.

HOKE SMITH,
Secretary."

And your *orator* allege and show that there was no other further finding, determination, certification or recommendation made by any officer of the Interior Department at any time as to the character of any of the lands embraced in said list, and which were afterwards included in the alleged patent hereinafter mentioned, as to their being or not being mineral lands.

XV.

Your *orator* further say and show that thereafter and in pursuance of and in conformity with the said recommendation of the Commissioner of the General Land Office and said approval thereof by the said Secretary of the Interior, the officers of the In-

terior Department who were charged by law with the duty of preparing [64] and issuing patents to lands due to be issued by the United States, did, on, to wit, the 10th day of July, 1894, prepare, execute, issue and deliver to the said defendant, Southern Pacific Railroad Company, a certain alleged patent, a true copy of which, excepting only the descriptions of other lands not involved in this suit, is hereto attached, marked "Exhibit A," and made a part of this Bill of Complaint, wherein was set forth all of said list of lands listed by said the Southern Pacific Railroad Company for patent under said grant upon its said *ex parte* application, and that immediately following said list of lands in said patent is the entire granting clause of said alleged patent, which is in words and figures as follows, to wit:

"NOW KNOW YE, That the United States of America, in consideration of the premises and pursuant to the acts of Congress, have given and granted, and by these presents do give and grant unto the Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of *of* land selected as aforesaid, and described in the foregoing.

Yet excluding and excepting 'All Mineral Lands,' should any such be found in the tracts aforesaid: but this exclusion and exception according to the terms of the statute shall not be construed to include 'coal and iron lands.'

TO HAVE AND TO HOLD the same, with the appurtenances, unto the said Southern Pa-

80 *J. I. Lamprecht and F. M. Aiken, Trustees,*
cific Railroad Company, and to its successors
and assigns forever."

XVI.

Your orators further say and show to the Court that at no time during the pendency of said *ex parte* application for patent of said lands, was any notice, constructive or actual, given [65] to any of the locators of said prior mining locations, of the application of the said Southern Pacific Railroad Company for patent to said lands, nor was there any publication of such notices, nor was there any hearing ordered or had in the Interior Department, or in any branch thereof, for the purpose of allowing any persons having mining claims or other claims on any of said lands, to be heard and have their rights in or to any of said lands examined or determined, and said list of lands was certified as aforesaid, without opportunity being given to any of said prior mining locators of any of said lands to be heard in defense of their rights to any of said lands under said mining locations, and the officers of the Land Department never acquired jurisdiction to conceal, and never did conceal, said mining locations, and never acquired jurisdiction otherwise to defeat or in any wise affect any rights of the locators thereof thereunder, and never attempted or presumed to or did molest or interfere in any way whatsoever with such rights.

XVII.

Your *orator* further say and show unto the Court that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circum-

stances herein stated and alleged, did for itself, its successors and assigns forever, accept and assent to and submit to and agree to be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said Act and joint resolution, and said patent, or either or any of them, contained, and so accepting the same and assenting and submitting thereto and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the office of the Recorder of the County of Fresno and State of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands, or [66] any part thereof, under or through it by virtue of said Act of Congress and joint resolution and said patent, or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions and reservations, and are in equity and in conscience estopped to resist or deny the binding force and effect of the same, or any part of any thereof.

XVIII.

Your orators further say and show that the lands described in paragraph III of this Bill of Complaint are not within the limits of twenty miles of any completed section of twenty-five consecutive miles of the line of the railroad of said defendant, Southern Pacific Railroad Company, and are not coterminous with any completed section of twenty-five consecutive miles of the line of the said railroad, and that the railroad to aid in the construction of which said

grant of lands was made, has never been completed, and that all of the lands described in paragraph III of this Bill of Complaint lie opposite to and coterminous with an uncompleted section of twenty-five consecutive miles of said railroad line, and that prior to the certification of said list of lands and the issuance of said alleged patent as aforesaid, the said Southern Pacific Railroad Company had received from the United States, for the construction of its said railroad, land to the amount of more than ten alternate odd-numbered sections per mile for all the railroad it has ever constructed under its grant, and that said alleged patent was illegally issued, and was issued without any jurisdiction on the part of any officer of the United States, or any Department thereof, to issue the same, and was issued in violation and in contravention of the provisions of Section 4 of said Act of July 27th, 1866; and your *orator* alleges and avers that said recommendation of said list [67] of lands for patent by the Commissioner of the General Land Office, and said approval thereof by said Secretary of the Interior, and the issuance of said alleged patent, were all wholly without authority of law and in contravention and violation of the 7th Section of the Act of March 3d, 1887, and that said certification and said alleged patent were and ever have been inoperative, void and of no effect.

XIX.

Your orators further allege and show that the lands described in paragraph III of this Bill of Complaint were, on, to wit, the 3d day of March,

1909, vacant, unappropriated public mineral lands belonging to the United States, except for the mining locations theretofore made thereon, as alleged in paragraph IX of this Bill of Complaint, and that on, to wit, the 3d day of March, 1909, no annual assessment work for the year of 1908 had been done or commenced on any of said prior mining claims, and said lands were open to relocation as placer mining grounds, and that on, to wit, the 3d day of March, 1909, this complainant, and A. L. Frick, N. J. Frick, S. L. Phillips, E. Phillips, M. E. Wall, B. McGowan and E. M. Dunweadie, acting as an association of eight persons, entered on said lands and relocated each quarter section thereof as placer mining ground, under and in accordance with the mining laws of the United States and the rules, regulations and customs of miners in the district where said lands are situated, and posted upon each of said quarter sections so relocated the notice of such relocation required by law to be posted, and did thereafter and on, to wit, the 6th day of March, 1909, cause copies of each of said relocation notices to be duly recorded in the office of the Recorder for the county of Fresno, State of California, which was then the proper and lawful place for the recordation of mining locations made within said county where said lands are situated, and did thereby succeed to [68] all the right, title and interest of said prior mining locators in and to all of said lands and to the discoveries on which said prior mining locations were predicated.

XX.

That contemporaneous with the making of said relocations there was a discovery of mineral by said relocators on each quarter section or one hundred and sixty acre tract of said land, and prior thereto said land had been properly and legally examined by the Department of the Interior and designated by it as lands bearing mineral in commercial quantities and more valuable for mining purposes than for any other purpose.

XXI.

Your orators further say and show that said defendant, Southern Pacific Railroad Company, had never, prior to the beginning of this suit, been in actual, open, notorious, exclusive, continuous and hostile possession of any of said lands described in paragraph III of this Bill of Complaint.

XXII.

Your orators further allege that, subject only to the paramount title of the United States, *he* is the owner and entitled to the possession of all the lands described in paragraph III hereof, as placer mining claims under the mining laws of the United States, to the extent of one-tenth ($1/10$) undivided interest in the whole thereof; and that your orator is informed and believes, and upon such information and belief alleges, that J. I. Lamprecht and F. M. Aiken, Trustees, are the owners in trust for the benefit of a large number of persons, firms and corporations, other than the said defendants, the Southern Pacific Railroad Company and The Kern Trading and Oil Company, and are entitled to the possession of all of

said lands described in paragraph III hereof, to the extent of an undivided nine-tenths (9/10) thereof, as placer mining claims, subject only to the paramount title of the [69] United States.

XXIII.

Your orators further allege and show that said alleged patent constitutes a cloud upon the said title of your orator in and to said lands, and that the reasonable and market value of each of said mining claims is upwards of Sixty Thousand Dollars (\$60,000.00), and that the reasonable and market value of your orator's said undivided interest in each of said mining claims is upwards of One Million Five Hundred Thousand Dollars.

XXIV.

Your orators further allege and show that the said defendants other than said J. I. Lamprecht and F. M. Aiken, Trustees, claim to have some right, title or interest in or to said premises described in paragraph III hereof, or to some portion thereof, adverse to these answering defendants, but all such claims are illegal and invalid, and they have not, either jointly or severally, any right, title or interest in or to the same, or any part thereof, or in or to any part of the said mining claims now subsisting thereon,

WHEREFORE, your orators prays:

1st: That a construction and an interpretation be made by this Court in this suit of Section 3, 4, 6 and 18, of said Act of Congress approved July 27th, 1866, and of the joint resolution of Congress approved June 28th, 1870, and all the other Acts of Congress

mentioned in the Bill of Complaint, in relation to their application to the facts and circumstances stated and alleged in this Bill of Complaint.

2d: That a construction and interpretation be made by this Court in this suit of the recommendation of the Commissioner of the General Land Office for the certification and approval by the Secretary of the Interior of the said list of lands, and of the approval by the Secretary of the Interior of said recommendation [70] as set forth and alleged in the Bill of Complaint, and also of said patent, including the claims in said alleged patent excepting and excluding all mineral lands from conveyance by said alleged patent.

3d: That all of said defendants be required to set forth the nature of their respective claims in and to the property described in paragraph III of the Bill of Complaint, and that all claims of said defendants and of the complainant in or to said lands and said mining claims adverse to your orators may finally be determined by decree of this Court in this suit.

4th: That it may be ordered, adjudged and decreed by this Court in this suit that none of said defendants, except J. I. Lamprecht and F. M. Aiken, Trustees as aforesaid, have any right, title or interest in or to said lands described in paragraph III of this Bill of Complaint, or in any part thereof, or in or to said mining claims, or any thereof, and that they and each and all of them are, and that they be estopped from claiming any right, title or interest in or to the same, and that these answering defendants' title to said lands be quieted.

5th: That an interlocutory injunction in due form be issued by this Court, directed to each and all of the defendants herein, except the said defendants J. I. Lamprecht and F. M. Aiken, Trustees as aforesaid, commending them, and each of them, and all other persons in privity with them, to refrain and desist from any interference with the property described in paragraph III of this Bill of Complaint, or the minerals therein, and from interfering with complainant's or these answering defendants' possession thereof, until the final determination of this suit, and that upon final hearing therein said injunction may be made perpetual.

6th: That your orators may have such other, further and [71] different relief, order or decree, the premises being considered, as to the Court may seem just and equitable.

INGALL W. BULL,

Business Address: 616-617 Central Bldg., Los Angeles, California.

Of Counsel.

State of California,
County of Los Angeles,—ss.

Ingall W. Bull, being duly sworn, deposes and says that he is the atty. for the defts. above named; that he has read the foregoing Bill, and knows the contents thereof; that the same is true, of his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters, he believes them to be true; that said J. I. Lamprecht

88 *J. I. Lamprecht and F. M. Aiken, Trustees,*
and F. M. Aiken are nonresidents of and are absent
from Los Angeles County, California.

INGALL W. BULL.

Subscribed and sworn to before me, this 1st day of
November, 1910.

CORA E. MONTGOMERY, [Seal]

Notary Public, Los Angeles County, State of Cali-
fornia. [72]

Exhibit "A."

PATENT.

TO ALL TO WHOM THESE PRESENTS
SHALL COME, GREETINGS:

WHEREAS by the Act of Congress approved July 27, 1866, and Joint Resolution of June 28, 1870, "to aid in the construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast" and to secure to the Government the use of the same for postal, Military and other purposes, wuthority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the State, to construct a Railroad and Telegraph Line, under certain conditions and stipulations expressed in said Act, from the City of San Francisco to a point of connection with the Atlantic and Pacific Railroad near the boundary line of said State, and provision is made for granting to the said Company, "every slternate section of public land designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said Railroad, on the line thereof, and within the limits of twenty miles on each side of said road" "not sold, reserved, or otherwise disposed of

by the United States, and to which pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.”

AND WHEREAS, Official statements from the Secretary of the Interior, have been filed in the General Land Office, showing that the Commissioners appointed by the President under the provisions of the fourth section of the said Act of July 27, 1866, have reported to him, that the line of said railroad and telegraph from San Jose to *Tre Pimos* and from Alcalde to Mojave, together comprising Two Hundred and Fifty Two miles and four hundred and seventy-nine thousandths of a mile has been constructed and fully completed and equipped in the manner prescribed by said Act of July [73] 27, 1866, and accepted by the President.

AND WHEREAS the following tracts have been duly listed under the Act aforesaid by the duly authorized land agent of the said Southern Pacific Railroad Company, as shown by his original lists of selections approved by the local officers and on file in this office.

AND WHEREAS the said tracts of land lie co-terminous to the constructed line of said road and are particularly described as follows, to wit:

South of base line and East of Mt. Diablo Meridian,
State of California.

Township Nineteen, Range fifteen.

All of Section 33, containing 640 acres.

(With other land.)

The said tracts as described in the foregoing make the aggregate area of 440,900.85 acres.

NOW, KNOW YE, that the United States of America, in consideration of the premises and pursuant to the said Acts of Congress, Have Given and Granted and by these presents do give and grant unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing. Yet excluding and excepting "All Mineral Lands," should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute, shall be constructed to include "Coal and Iron Lands."

TO HAVE AND TO HOLD the same with the appurtenances unto the said "Southern Pacific Railroad Company" and to its successors and assigns forever.

IN TESTIMONY WHEREOF, I GROVER CLEVELAND, President of the United States, have caused these letters to be made patent and the Seal of the General Land Office to be hereunto affixed.
[74]

Given under my hand at the City of Washington, this the Tenth day of July, in the year of our Lord One Thousand eight hundred and ninety four and the Independence of the United States, the one hundred and nineteenth.

By the President: GROVER CLEVELAND.

[Seal]

M. McKEAN,

Secretary.

L. Q. LAMAR,

Recorder of the General Land Office.

Recorded in Vol. 14, pp. 103 to 142, inclusive.

Patent No. 22.

Recorded Feb. 16, 1895, at 8:27 o'clock A. M. in Vol. P. of Patents, page 283 et seq., Fresno County Records.

[Endorsed]: No. 192. In the Circuit Court of the United States for the Southern District of California, Northern Division. In Equity. Edmund Burke, Complainant, vs. Southern Pacific Railroad Company et al., Defendants. Answer of *I. J. Lamprecht* and *F. M. Aiken* to Amended Bill. Filed Nov. 1, 1910. *Wm. M. Van Dyke*, Clerk. *Chas. N. Williams*, Deputy. *D. J. Hinkley*, Solicitor for Cross-complainants, #1008 Wright & Callendar Building, Los Angeles, California. [75]

Case No. 192.

United States Circuit Court, Ninth Circuit, for the Southern District of California, Northern Division.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,
KERN TRADING & OIL COMPANY et al.,
Defendants.

Stipulation [for Filing Amended Bill of Complaint].

It is hereby stipulated that the above-named complainant may file and serve an amended bill of complaint in the above-entitled action, and that the demurrer of the defendants Southern Pacific Railroad Company and Kern Trading and Oil Company now

on file in the said action may stand as their demurrer to said amended bill when filed and served, and that the said defendants may file any further or amended demurrer or motion running to the said amended bill that they may consider advisable, all or any of which may be heard on the 21st day of November, 1910.

EDMUND BURKE,

In Pro. Per.

WM. SINGER, Jr.,

D. V. COWDEN and

GUY V. SHOUP,

Attorneys for Southern Pacific Railroad Co. and
Kern Trading and Oil Co.

[Endorsed]: No. 192. U. S. Circuit Court,
Southern District of California, Northern Division.
Edmund Burke vs. Southern Pacific Railroad Co. et
al. Stipulation. Filed Nov. 2, 1910. Wm. M. Van
Dyke, Clerk. Chas. N. Williams, Deputy. Guy V.
Shoup and D. V. Cowden, *Attorney* for Defendants.
Room 842, Flood Building, San Francisco. [76]

*In the Circuit Court of the United States of America,
in and for the Southern District of California,
Northern Division.*

No. 192.

EDMUND BURKE,

Complainant,

vs.

THE SOUTHERN PACIFIC RAILROAD COM-
PANY, THE KERN TRADING AND OIL
COMPANY, T. S. MINOT, JNO. I. LAM-
PRECHT and F. M. AIKEN, as Trustees,
et al.

Demurrer to Cross-Bill.

The demurrer of T. S. Minot, defendant herein, to
the Cross-Bill of Jno. I. Lamprecht and F. M. Aiken
the above-named defendant, shows:

That this defendant, T. S. Minot, by protesta-
tion, not confessing or acknowledging all, or any of
the matters or things in said Cross-Bill contained to
be true, in such a matter and form as the same are
therein set forth and alleged, demurs to the said
Cross-Bill of John I. Lamprecht and F. M. Aiken,
and for causes of demurrer shows:

1st. That the said defendants *hath* not in and by
said Cross-Bill named or stated such a cause as doth
or ought to entitle them to any such discovery or re-
lief as is thereby sought and prayed for from or
against this particular defendant or any relief what-
soever.

2nd. That the said Cross-Bill is exhibited against

this particular defendant and plaintiff and against a large number of other defendants named in said Bill for several and distinct and independent matters and causes which have no relation to each other and in which, or in a greater part of which this particular defendant is in no way interested or concerned, [77] and ought not to be implicated, thereby constituting a misjoinder of causes of suit.

3rd. That said Cross-Bill shows upon its face that defendants Jno. I. Lamprecht and F. M. Aiken have no right to or interest or estate in the land involved in this suit, either legal or equitable, or as trustees, which can be enforced by said defendants in this proceeding.

4th. That the said Cross-Bill is deficient in certainty and duplicitous in this:

(a) That it fails to show whether or not said cross-suit is instituted to forfeit a portion of the Southern Pacific Railroad Company's Land Grant, between Goshen Junction and Alcalde; (b) Or to vacate or annul a patent; (c) Or to set aside a fraudulent conveyance; (d) Or for partition; (e) Or to quiet title; (f) Or remove a cloud on title; (g) Or to enforce specific performance; (h) Or to enforce a trust; (i) Or to control the operation of a patent.

4½. Said Cross-Bill of Complaint also fails to show in what way this particular defendant is connected directly or indirectly, with the Southern Pacific Railroad Company, and the Kern Trading and Oil Company, and the defendants Jno. I. Lamprecht and F. M. Aiken, and other defendants, and constitutes and is a misjoinder of parties plaintiff

and defendant in this: Said Cross-Bill fails to show upon the face thereof, or otherwise, directly or by implication, any connection or privity of interest between T. S. Minot and defendants Jno. I. Lamprecht and F. M. Aiken, as trustees or otherwise, or what interest John Doe et al., have in common with plaintiff or defendants or otherwise, in the premises in dispute.

5th. That there is a nonjoinder of parties plaintiff, in this: Said Cross-Bill fails to show who Jno. I. Lamprecht and F. M. Aiken, trustees, are, and why they are not made parties [78] plaintiff in plaintiff's original bill as they should be instead of parties defendant, and fails to plead the reason or excuse for making said parties defendant, and fails to state or show the motive, cause or excuse for making said parties defendants in the original bill instead of plaintiffs, thereby creating by said disconnected equivocal and disjointed allegations an imperfect, improper and unintelligible Cross-Bill contrary to the Rule.

5½. Said supposititious Cross-Bill seeks no discovery and sets up no defense which might not as well have been taken by answer and is only a repetition of the original bill of complaint.

6th. That said Cross-Bill fails to show that Edmund Burke or Jno. I. Lamprecht and F. M. Aiken, as trustees, or otherwise, have or possess any authority from the United States of America, or the Attorney General of the United States of America, to institute proceedings to forfeit the land grant of the defendant the Southern Pacific Railroad Company

between Alcalde and Goshen Junction, and fails to show how this particular defendant is or could be implicated with or interested in any proceeding to forfeit said lands.

7th. That said Cross-Bill is deficient, uncertain, ambiguous and unintelligible in this: that said Bill fails to definitely and specifically point out and exhibit the fraud practiced upon the Department of the Interior of the United States of America by the Southern Pacific Railroad Company or how it was committed.

8th-a. That said Cross-Bill is ambiguous for the same causes and reasons set forth in paragraph 4, and for the further reason that its allegations are repugnant to and neutralize each other, and are self-destructive and paradoxical.

8th-b. That said Cross-Bill is unintelligible for the same causes and reasons set forth in paragraph 4, and for the [79] further reason that it cannot be understood therefrom who Jno. I. Lamprecht and F. M. Aiken, as trustees, are; what interest they have in the subject matter of this suit; why they are joined as parties in the original bill; why they are made defendants in the original bill; why they are not made plaintiffs in the original bill; what is the nature and extent of their trust; what they are trustees of; for whom they are trustees; whether they are trustees of an express, constructive or resulting trust.

8th-c. That said Cross-Bill is multifarious for each and all the reasons set forth in paragraph 4, 8-a, 8-b, and 2, to which reference is hereby specifically made, and the same are made a part of this

objection and ground of demurrer to said Cross-Bill.

8th-d. That said Cross-Bill does not state the facts constituting the several causes of suit in separate counts, or causes of suit, separately numbered, as by the code, or good pleading required, so as to advise the Court and the opposite party of the pleaders' intention, thereby making said Cross-Bill ambiguous, uncertain and unintelligible.

9th. That said Cross-Bill is deficient and uncertain in this, that it fails to state or give the addresses and residences of the defendants, and the Court cannot understand therefrom whether said parties are fictitious or not, or locate the same for costs; or for any purpose or purposes connected with this litigation, or to enforce the orders of this Court, and is contrary to the rule.

10th. That said nondescript Cross-Bill does not show specifically any privity of interest between the complainant herein and these particular defendants.

11th. This defendant further demurring to said Cross-Bill shows unto your Honors that the said defendants have not [80] made or stated and doth not make and state in said Cross-Bill such a cause of suit as doth entitle them in a court of equity to the cross relief prayed for, or any part thereof, or to any relief whatsoever.

12th. The defendant further demurs to each, every and all paragraphs of defendant's Cross-Bill for that they only state conclusions of law.

WHEREFORE this particular defendant, for himself, for divers other good causes of demurrer appearing in the said Cross-Bill, further demurs

thereto, and he prays judgment of this Honorable Court whether he shall be compelled to make any other or further answer to said Cross-Bill, or any of the matters and things therein contained. And this particular defendant prays to be hence dismissed with his reasonable costs in his behalf sustained, and further prays that said Cross-Bill be wholly dismissed, or stricken from the files, and for general relief.

T. S. MINOT,
In Pro. Per.

State of California,
City and County of San Francisco,—ss.

I, T. S. Minot, being first duly sworn, depose and say: That I am an Attorney at Law and Solicitor in Chancery, and duly admitted to practice in this court; that I am one of the defendants set forth and mentioned in the above demurrer, and in the Cross-Bill of defendants Jno. I. Lamprecht and F. M. Aiken and in the first amended Bill of Complaint of Edmund Burke on file in this court, and the above-entitled suit; said suit being numbered 192, and that I appear in pro per, and I further say that the foregoing demurrer to the Cross-Bill, exhibited in this suit, is not interposed for delay, but in good faith.

T. S. MINOT. [81]

Subscribed and sworn to before me this 9 day of November, 1910.

[Seal]

W. L. MYERS,
Notary Public in and for Los Angeles Co., State of California.

My Commission expires 2/1, 1914.

Southern District of California,
Northern Division,—ss.

I, T. S. Minot, one of the defendants herein mentioned, on my own behalf, hereby certify that I am an attorney at law, and a Solicitor in Chancery, and duly admitted to practice in this Court, and that in my opinion the foregoing demurrer is well founded in law.

T. S. MINOT.

[Endorsed]: No. 192. United States Circuit Court, Southern District of California, Northern Division. Edmund Burke, Plaintiff, vs. Southern Pacific Railroad Co. et al., Defendants. Demurrer to Cross-Bill of Jno. I. Lamprecht and F. M. Aiken. Received Copy of Within Demurrer to Cross-Bill of J. I. Lamprecht & Aiken this 9th day of November, 1910. Ingall W. Bull, Attorney for Lamprecht & Aiken. Filed Nov. 10, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. T. S. Minot, in Pro Per., 1003 Phelan Bld., San Francisco, Calif., Angelus Hotel, Los Angeles, Cal. [82]

**[Joint and Several Demurrer to Cross-Bill of
Complaint.]**

*United States Circuit Court, Ninth Circuit, North-
ern Division of the Southern District of Cali-
fornia.*

. IN EQUITY—Case No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY
et al.,

Defendants.

The Joint and Several Demurrer of the defend-
ants Southern Pacific Railroad Company and Kern
Trading and Oil Company, to the Cross-Bill of Com-
plaint of John I. Lamprecht and T. M. Aiken herein.

These defendants, Southern Pacific Railroad Com-
pany and Kern Trading and Oil Company, jointly
and severally, by protestation, not confessing or ac-
knowledging all or any of the matters or things in
the said Cross-Bill of Complaint to be true in such
manner and form as the same are therein set forth
and alleged, demur thereto and to the whole thereof
and for cause of demurrer show:

1st. That the said Cross-Bill of Complaint does
not state a cause of action, or cause of suit, against
these defendants, or any of them, within the juris-
diction of this Court.

2nd. That the said Cross-Bill of Complaint does

not set forth or show any matter, equity, or cause, entitling cross-complainants, or any of them, to file or maintain the same against these defendants, or any of them.

3rd. That the said Cross-Bill of Complaint does not set forth or show any matter, equity, or cause, entitling cross-complainants, [83] or any of them, to the discovery thereby sought, required, or prayed, or to any discovery whatsoever, of or from these defendants, or any of them.

4th. That the said Cross-Bill of Complaint does not set forth or show any matter, equity, or cause, entitling cross-complainants, or any of them, to the relief thereby sought or prayed, or to any relief whatsoever, of or from these defendants, or any of them.

5th. That it appears by the allegations of the said Cross-Bill of Complaint that any cause of action, or cause of suit, shown or sought to be shown thereby, is barred by the first section of the Act of Congress, approved March 2d, 1396, entitled "An Act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes," printed and published in Volume 29, on pages 42 and following, United States Statutes at Large.

6th. That it appears by the allegations of the said Cross-Bill of Complaint that any cause of action, or cause of suit, shown or sought to be shown by the said Cross-Bill of Complaint is barred by:

(a). The provisions of section 318 of the Code of Civil Procedure of the State of California.

(b). The Provisions of section 319 of the Code of Civil Procedure of the State of California.

(c). The provisions of section 320 of the Code of Civil Procedure of the State of California.

(d). The provisions of section 321 of the Code of Civil Procedure of the State of California.

(e). The provisions of section 338 of the Code of Civil Procedure of the State of California.

(f). The provisions of section 343 of the Code of Civil Procedure of the State of California.

[84]

7th. That it appears by the allegations of the said Cross-Bill of Complaint that any cause of action, or cause of suit, shown or sought to be shown by the said Cross-Bill of Complaint, is barred by the long delay and laches of the cross-complainants, and of each of them.

Wherefore, these defendants, jointly and severally, pray the judgment of this Honorable Court whether they, or any of them, shall make any further or other answer to the said Cross-Bill of Complaint, or to any part thereof, or to any matters or things therein set forth; and further pray to be hence dismissed, with their costs in this behalf sustained.

GUY V. SHOUP and

D. V. COWDEN,

Attorneys for the said Defendants.

WM. SINGER, Jr.,

Counsel for the said Defendants.

State of California,

City and County of San Francisco,—ss.

G. L. King makes solemn oath and says: That he

is the Secretary of the Southern Pacific Railroad Company, named as one of the defendants in and to the foregoing Joint and Several Demurrer; and that the said Demurrer is not interposed for delay.

G. L. KING.

Subscribed and sworn to before me on November 9th, 1910.

[Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

I hereby certify that, in my opinion, the foregoing Joint and Several Demurrer is well taken in point of law.

WM. SINGER, Jr.,

Counsel for the said Defendants. [85]

[Endorsed]: No. 192. U. S. Circuit Court, Southern District of California, Northern Division. Edmund Burke vs. Southern Pacific Railroad Co. et al. Joint and Several Demurrer of S. P. R. R. Co. and Kern Trading & Oil Co. to Cross-Bill of Lamprecht et al. Filed Nov. 11, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Guy v. Shoup and D. V. Cowden, *Attorney* for Defendants, Room 842, Flood Building, San Francisco. [86]

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit,
Southern District of California, Northern Di-
vision.*

No. 192.

Clerk's Office.

EDMUND BURKE,

Compl't,

vs.

SOUTHERN PACIFIC RAILROAD CO.,

Deft.,

and

J. I. LAMPRECHT et al., Trustees,

Cross-Complts.,

vs.

SOUTHERN PACIFIC RAILROAD CO. et al.,

Defendants.

Praeceptum [for Appearance].

To the Clerk of said Court:

Sir: Please enter my appearance as Solicitor of Record for the Cross-complainants J. I. Lamprecht and F. M. Aiken, Trustees.

DELBERT J. HINKLEY,

1008 Wright & Callender Bldg., Los Angeles, Cal.

Dated Dec. 27, 1910.

[Endorsed]: No. 192. U. S. Circuit Court, Ninth Circuit, Southern District of California, Northern Division. Burke vs. S. P. R. R. Co. et al. Praeceptum for Appearance. Filed Dec. 27, 1910. Wm. M. Van

Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.
[87]

[Appearance of J. I. Lamprecht and F. M. Aiken by
D. J. Hinkley.]

*In the Circuit Court of the United States, of the
Ninth Judicial Circuit, in and for the Southern
District of California, Northern Division.*

No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD CO. et al.,
Defendants.

Pursuant to the written request of Delbert J. Hinkley, Esq., the appearance of the cross-complainants, J. I. Lamprecht and F. M. Aiken, Trustees, and of Delbert J. Hinkley, Esq., their solicitor, is hereby duly entered in the above-entitled cause, this 27th day of December, 1910.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

Filed and entered December 27th, 1910.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk. [88]

*In the Circuit Court of the United States, for the
Southern District of California, Northern Di-
vision.*

IN EQUITY—No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY
et al.,

Defendants,

and

J. I. LAMPRECHT et al.,

Cross-complainants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY
et al.,

Cross-defendants.

**Stipulation [as to Filing Amended Cross-Bill and
Demurrer Thereto.]**

It is hereby stipulated and agreed by and between J. I. Lamprecht and F. M. Aiken, cross-complainants in this cause, and Southern Pacific Railroad Company and The Kern Trading and Oil Company, cross-defendants in said cause, by their respective solicitors, that said cross-complainants may file and serve in said cause an amended cross-complaint, and that the demurrer of said cross-defendants to the original cross-complaint may stand as their demurrer to such amended cross-complaint the same as if

it had been filed as the original cross-complaint.

Dated Dec. 30th, 1910.

WM. SINGER, Jr.,
GUY V. SHOUP and
D. V. COWDEN,

Solicitors for Cross-defendants.

D. J. HINKLEY,

Solicitor for Cross-complainants. [89]

[Endorsed]: No. 192. U. S. Circuit Court, Southern District of California, Northern Division. Edmund Burke vs. Southern Pacific Company et al. Stipulation. Filed Jan. 9, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [90]

[Cross-Bill of Complaint of J. I. Lamprecht and F. M. Aiken, Trustees.]

*In the Circuit Court of the United States in and for
the Southern District of California, Northern
Division.*

IN EQUITY—Number 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,
The Kern Trading and Oil Company, Thomas
W. Newlin, W. H. Layson, N. W. Spaulding,
F. D. Culver, C. F. Bassett, Henry C. Bunker,
Mary Ann Haddon, A. R. Cotton, Daniel E.
Rayes, E. M. Root, Jarvis L. Doyle, E. N.
Richardson, Hattie E. Miner, Helen Pollock,

George A. Doyle, B. Block, Loretta B. Hart, Annie M. Bassett, Merrill D. Evans, William Miner, J. V. Ellis, Mary A. Hedden, Leonora J. Evans, Oregon Sanders, James Hedden, E. M. Redding, J. R. Manran, William Pollock, Joseph Hart, E. S. Payne, Mary J. Hilda, Albert Betz, A. L. Frick, M. J. Frick, S. L. Phillips, E. Phillips, M. E. Wall, E. M. Dunweedie, Barclay McGowan, John Doe, Richard Roe, Thomas Green, Henry Doe, James Doe, Edward Roe, Peter Doe, Dolly Doe, Frank Doe, Joseph Doe, Jacob Doe, Isaac Doe, Katy Doe, Harry Doe, Davis Doe, Duke Doe, Minnie Doe, Bunny Doe, Jerry Doe, McGowan Doe, Grant Doe, Platt Roe, George Morton, Jno. I. Lamprecht, and F. M. Aiken, as Trustees, George D. Roberts, Q. L. Phelps, James Meynard, Jr., A. M. Anderson, T. S. Minot, Newton A. Johnson, David Ewing, [91] D. M. Speed, Wm. Johnson, S. J. Gallagher, O. D. Loftus, Willis George Emerson, W. W. Ayres, H. E. Ayres, W. J. Thomas, D. J. Hinkley, Charles James, Chulk Roberts, Robert Rendall, Henry C. Kerr, George Engle, James Ward, J. L. D. Walp, T. J. Turner, Fred E. Windsor, M. J. Corey, P. W. Cypher, G. W. Wainer, Choud Burnes, W. H. Truzer, David Ishman, Ash Seince, Frank Provost, Samuel Murshback, H. R. Crozier, J. M. Robertson, P. C. Tuyler, Henry Greenleaf, R. M. Cook, I. W. Alexander, J. W. Swartzhammer, Henry Bamada, E. M.

Ayres, John W. Burdelle, Walter Baun and
E. M. Scott,

Defendants,

and

JOHN I. LAMPRECHT and F. M. AIKEN, Trus-
tees,

Cross-complainants,

vs.

EDMUND BURKE, SOUTHERN PACIFIC
RAILROAD COMPANY, The Kern Trading
and Oil Company, Thomas W. Nowlin, W.
H. Layson, N. W. Spaulding, F. D. Culver,
C. F. Bassett, Henry C. Bunker, Mary Ann
Haddon, A. R. Cotton, Daniel E. Rayes, E. M.
Root, Jarvis L. Doyle, E. N. Richardson,
Hattie E. Miner, Helen Pollock, George A.
Doyle, B. Block, Loretta B. Hart, Annie M.
Bassett, Merrill D. Evans, William Miner,
J. V. Ellis, Mary A. Hedden, Leonora J.
Evans, Oregon Sanders, James Hedden, E. M.
Redding, J. R. Manran, William Pollock,
Joseph Hart, E. S. Payne, [92] Mary J.
Hilda, Albert Betz, A. L. Frick, M. J. Frick,
S. L. Phillips, E. Phillips, M. E. Wall, E. M.
Dunweedie, Barclay McGowan, John Doe,
Richard Roe, Thomas Green, Henry Doe,
James Doe, Edward Roe, Peter Doe, Dolly
Doe, Frank Doe, Joseph Doe, Jacob Doe,
Isaac Doe, Katy Doe, Harry Doe, Davis Doe,
Duke Doe, Minnie Doe, Bunny Doe, Jerry
Doe, McGowan Doe, Grant Doe, Platt Roe,
George Morton, George D. Roberts, Q. L.

Phelps, James Meynard, Jr., A. M. Anderson, T. S. Minot, Newton A. Johnson, David Ewing, D. M. Speed, Wm. Johnson, S. J. Gallagher, O. D. Loftus, Willis George Emerson, W. W. Ayres, H. E. Ayres, W. J. Thomas, D. J. Hinkley, Charles James, Chulk Roberts, Robert Rendall, Henry C. Kerr, George Engle, James Ward, J. L. D. Walp, T. J. Turner, Fred E. Windsor, M. J. Corey, P. W. Cypher, G. W. Wainer, Choud Burnes, W. H. Truzer, David Ishman, Ash Seince, Frank Provost, Samuel Murshback, H. R. Crozier, J. M. Robertson, P. C. Tuyler, Henry Greenleaf, R. M. Cook, I. W. Alexander, J. W. Swartzhammer, Henry Bamada, E. M. Ayres, John W. Burdelle, Walter Baun and E. M. Scott,

Cross-defendants.

To the Judge of the Circuit Court of the United States for the Southern District of California.

[93]

John I. Lamprecht and F. M. Aiken, Trustees, bring this their Cross-Bill of Complaint against the above cross-defendants, and thereupon respectfully show unto the Court:

I.

That at all of the times hereinafter mentioned, the defendant, Southern Pacific Railroad Company, has been and is now a corporation created and existing pursuant to the laws of the State of California, having its principal office at the city of San Francisco, in the State of California.

II.

That the Kern Trading and Oil Company, for the last five (5) years, has been and is now a corporation created and existing pursuant to the laws of the State of California, having its principal office at the city of San Francisco, in the State of California, and during all of said time has been and now is wholly owned, dominated, controlled and operated by the said Southern Pacific Railroad Company, for the ulterior purpose of doing certain things which the said Southern Pacific Railroad Company is prohibited by law from doing, to wit, mining for petroleum and other minerals, and buying, selling and dealing in the same as a commodity, and claiming, for the benefit of the Southern Pacific Company, as its alleged lessee, the mineral lands hereinafter described, all of which is to the prejudice and damage of these cross-complaints, as hereinafter appear and are set forth.

III.

That the following described lands, to wit:

All of Section 11, 13, 23 and 33, Township 19 South, Range 15 East, Mount Diablo Base and Meridian, and all of Section 5, Township 20 South, Range 15 East, Mount Diablo Base and Meridian, all situated in Fresno County, California: [94]

are and have been since, to wit, the 1st day of January, 1865, known to be mineral lands of great value, containing mineral in paying quantities and more valuable for mining purposes than for any other purposes; all of which has been known to the Southern

Pacific Company, its officers and agents, since, to wit, the 1st day of January, 1865, and to the defendant, The Kern Trading and Oil Company, its officers and agents, since the date of its creation.

IV.

That heretofore the Congress of the United States passed a certain Act, which was approved by the President of the United States, July 27th, 1866, making a grant of public lands of the United States to the defendant, Southern Pacific Railroad Company, and that Section 3 of said Act of Congress, is in the words and figures as follows, to wit:

“Sec. 3. AND BE IT FURTHER ENACTED, That there be, and hereby is, granted to the Atlantic Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free [95] from pre-emption or

other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: PROVIDED, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: PROVIDED FURTHER, That the railroad company receiving the previous grant of land may assign their interest to said 'Atlantic and Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: PROVIDED FURTHER, That all mineral lands be, and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of

said road, and within twenty miles thereof, may be selected as above provided: AND PROVIDED FURTHER, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: AND PROVIDED FURTHER, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.' " [96]

V.

These cross-complainants further say and show that Section 18 of said Act of Congress is in words and figures as follows, to wit:

"Sec. 18. AND BE IT FURTHER ENACTED, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all of the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

VI.

These cross-complainants further say and show

that Section 4 of said Act of Congress is in words and figures as follows, to wit:

“Sec. 4. AND BE IT FURTHER ENACTED, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial [97] and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminus with said completed section of said road. And from time to time, when over twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.”

VII.

These cross-complainants further say and show that Section 6 of said Act is in words and figures as follows, to wit:

“Sec. 6. AND BE IT FURTHER ENACTED: That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this Act; but the provisions of the Act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled “An act to secure homesteads to actual settlers on the public domain, approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the [98] line of said road when surveyed, excepting those hereby granted to said company.

VIII.

These cross-complainants further say and show that thereafter the Congress of the United States passed a certain joint resolution, which was approved by the President of the United States on the 28th day of June, 1870, which joint resolution is in words and figures as follows, to wit:

“BE IT RESOLVED, etc., That the South-

ern Pacific Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior; he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminus to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act." [99]

IX.

These cross-complainants further say and show that prior to the 9th day of May, 1892, all of said lands described in paragraph III of this Cross-Bill

were, except for the mining claims hereinafter mentioned, unappropriated public mineral lands of the United States and subject and open to location under the mining laws of the United States, and that, prior to said 9th day of May, divers citizens of the United States, did, pursuant to the mining laws of the United States and the rules, regulations, customs and usages of miners then in force in the mining district in which said lands were situated, enter upon and locate, as placer mining ground, all of the lands described in paragraph III of this Cross-Bill in mining claims of one-quarter section each, after a discovery of mineral made by the locaters thereof on each of said mining claims, and that all of said mining locations remained in full force and effect, uncanceled and unforfeited, from the date of their location as aforesaid, until, to wit, the 3d day of March, 1909, whereby all of said lands became and were and continued to be, during all of said time, segregated from the public domain.

X.

That the Coalinga Mining District included within its boundaries all of the lands described in paragraph III of this Cross-Bill and was organized prior to the 9th day of May, 1892, and that all of said mining locations were duly recorded prior to the 9th day of May, 1892, in the office of the Recorder of said Mining District, which was the proper place for the recording of the same, according to the rules, regulations, customs and usages of the miners of said district; of all of which the said defendants, Southern Pacific Railroad Company and the Kern

Trading and Oil Company, their officers and agents, have at all times since the recording of the same had notice. [100]

XI.

These cross-complainants further say and show, that there was not, at the time of the location of said mining claims as aforesaid, or at the time of the recording of the notice of said locations as aforesaid, nor has there at any time since been, any rule, regulation, custom or usages of the miners of said Mining District, or any state or federal law, requiring the recordation in the United States Local Land Office at Visalia, California, or in the General Land Office at Washington, D. C., of notice of any mining location made within said Mining District, and that the Visalia Land Office for the Visalia Land District, wherein all of said lands are situated, has never at any time since its organization had or kept any record of mining claims located within said Land District, until such time as locators of such mining claims made application at said Local Land Office for patents of lands covered by such mining claims; of all of which the said defendant, Southern Pacific Railroad Company, its officers and agents and the officers and agents of the Interior Department of the United States, and all branches of said Interior Department, have at all times herein mentioned had notice, and of all of which said The Kern Trading and Oil Company, and its officers and agents, have, at all times since the date of its creation had notice.

XII.

These cross-complainants further say and show

that notwithstanding said knowledge and notice, and notwithstanding the said Southern Pacific Railroad Company, its officers and agents, well knew that all of the lands described in paragraph III of this Cross-Bill were mineral lands, and Lands on which there were valid, subsisting mining locations of record as aforesaid, and that the same had not been granted to the said Southern Pacific Railroad Company, and that it had no right to have or receive the [101] said lands, and that the said lands were expressly excluded from the operations of its said grant. the said Southern Pacific Railroad Company did falsely, fraudently and corruptly cause one Jerome Madden, its then Land Agent, on or about the 9th day of May, 1892, to make and file, and that he did make and file, in the United States Local Land Office at Visalia, California, a certain false, wicked, corrupt and fraudulent affidavit and application for patents of certain lands, including, among others, the lands described in paragraph III of this Cross-Bill, in manner and form as follows, to wit:

“STATE OF CALIFORNIA,

CITY AND COUNTY OF SAN FRANCISCO.

I, JEROME MADDEN, being duly sworn, depose and say that I am the land agent of the Southern Pacific Railroad Company; that the foregoing lists of land which I hereby select, is a correct list of a portion of the public lands claimed by the said Southern Pacific Railroad Company, as inuring to it, to aid in the construction of the railroad of said company, from a point in the northeast quarter of Section 2,

Township 19 South, Range 20 East, M. D. B. & M. to Alcade, for which a grant of lands was made by the Acts of Congress approved July 27, 1866, July 25, 1868, and June 28, 1870, as aforesaid, and that said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant, being within the limits of twenty miles on each side of the line of route for a continuous distance of forty 559/1000 miles, being for the 9th and 17th sections of said road, starting from a point in the northeast quarter of Section 2, Township 19 South, Range 20 East, M. D. B. & M., and ending at a [102] point in the northeast quarter of Section 23, Township 21 South, Range 14 East, M. D. B. & M.

(Signed) JEROME MADDEN.

Sworn to and subscribed before me this 9th day of May, 1892

Witness my hand and notarial seal.

E. B. RYAN.

Notary Public in and for the City and County of San Francisco, in the State of California."

And these cross-complainants allege and aver that said affidavit of said Madden, made and filed as aforesaid, was and is false, in that it states relative to all the lands included in the list to which it refers, that they were unappropriated and not interdicted mineral or reserved lands, while in fact the lands described in paragraph III of this Cross-Bill, which

were all included in said list, were, at the time of the making and filing of said affidavit, appropriated as placer mining ground, and were all interdicted mineral and reserved lands of great value, and were notoriously known to be such.

XIII.

These cross-complainants further say and show, that prior to the 14th day of May, 1892, the defendant, Southern Pacific Railroad Company, made said *ex parte* application to the Interior Department of the United States, through the Local Land Office at Visalia, California, for patent to all of the lands described in the list of lands referred to in said affidavit made by said Jerome Madden as aforesaid, but did not in said application or otherwise, ask to have the mineral or nonmineral character of said lands, or any thereof, determined before issuance of the patent which it sought in and by said *ex parte* application, and [103] that thereafter and on, to wit, the 14th day of May, 1892, the Register and Receiver of said Local Land Office did certify that they had examined said list of lands and tested the accurancy thereof by the plats and records of their office; that they found the same to be correct; that the filing of said list of lands was allowed and approved; that the whole of said lands were surveyed public lands of the United States and within the limits of twenty miles on each side of the line of said road, and that the same were not, nor was any part thereof, returned and *demoniated* as mineral lands nor claimed as swamp lands, and that there was not any homestead pre-emption State of other

valid claims to any portion of said lands on file or on record in said Local Land Office.

XIV.

These cross-complainants further say and show that thereafter, and prior to, to wit, the 27th day of June, 1894, the officers of the General Land Office examined said list of lands in connection with the records and plats of that office, upon said *ex parte* application, and found, among other things that said lands fell within the twenty miles lateral limits of said road, and that they were, so far as the records of the General Land Office showed, "free from conflict"; but these cross-complainants allege and show that the officers and agents of the Interior Department had not theretofore had, for the examination of said lands, sufficient opportunity to determine whether any of said lands were or were not mineral lands, or to justify a statement by them in the patent of the United States that said lands were nonmineral, and that neither the officers of the Local Land Office at Visalia, nor the officers of the General Land Office or of the Interior Department, ever found or determined that all of said lands were non-mineral in character, or attempted to decide or did decide whether they were or were not mineral lands. [104] And thereupon the then Commissioner of the General Land Office did in conformity with the rulings and decisions of the Interior Department which were then in full force and effect, and which had obtained and been followed by the officers of that Department in such cases for many years, to wit: forty years, recommend to the then Secretary of the

Interior as follows, to wit:

“It is hereby recommended that the tracts described,” (in said list) “covering 440,900.85 acres, be approved and carried into patent as the lands falling within the grant by the act aforesaid to the said Southern Pacific Railroad Company, of California, excluding, however, from the approval and from the transfer in the patent that may be issued, ‘All mineral lands,’ should any such be found in the tracts aforesaid; but this exclusion, according to the terms of the Statute, ‘shall not be construed to include coal and iron.’

G. W. LAMOREAUX,
Commissioner.”

And these cross-complainants allege and show, that said recommendation of said Commissioner of the General Land Office was thereupon approved by the then secretary of the Interior, in words and figures as follows, endorsed upon said recommendation, to wit:

“Approved; covering four hundred and forty thousand, nine hundred and eighty-five hundredths of an acre.

HOKE SMITH,
Secretary.”

And these cross-complainants further allege and show, that there was no other or further finding, determination, certification or [105] recommendation made by any officer of the Interior Department at any time prior to the issuance of said alleged patent, as to the mineral or nonmineral character of

any of the lands embraced in paragraph III of this Cross-Bill, and which were afterwards included in the alleged patent hereinafter mentioned.

XV.

These cross-complainants further say and show, that thereafter and in pursuance of and in conformity with the said recommendation of the Commissioner of the General Land Office and said approval thereof by the said Secretary of the Interior, the officers of the Interior Department who were charged by the law with the duty of preparing and issuing patents to lands due to be issued by the United States, did, on, to wit: the 10th day of July, 1894, prepare, execute, issue and deliver to the said defendant, Southern Pacific Railroad Company, a certain alleged patent, a true copy of which, excepting only the descriptions of other lands not involved in this suit, is hereto attached, marked Exhibit "A," and made a part of this Cross-Bill, wherein was set forth all of said list of lands listed by said the Southern Pacific Railroad Company for patent under said grant upon its said *ex parte* application, and that immediately following said list of lands in said patent, is the entire granting clause of said alleged patent, which is in words and figures as *as* follows, to wit:

"NOW, KNOW YE, That the United States of America, in consideration of the premises and pursuant to the acts of Congress, have given and granted, and by these presents do give and grant unto the Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid, and de-

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scribed in the foregoing. [106]

Yet excluding and excepting 'All Mineral Lands,' should any such be found in the tracts aforesaid: but this exclusion and exception according to the terms of the statute shall not be construed to include 'coal and iron lands.'

TO HAVE AND TO HOLD the same, with the appurtenances, unto the said Southern Pacific Railroad Company, and to its successors and assigns forever."

XVI.

These cross-complainants further say and show to the Court that at no time during the pendency of said *ex parte* application for patent of said lands, was any notice, constructive or actual, given to any of the locators of said prior mining locations, of the application of the said Southern Pacific Railroad Company for patent to said lands; nor was there any publication of notice of such application, nor was there any hearing ordered or had in the Local Land Office at Visalia or the Interior Department, or in any branch thereof, for the purpose of allowing any persons having mining claims or other claims on any of said lands, to be heard and have their rights in or to any of said lands examined or determined, and said list of lands was certified as aforesaid without the knowledge or consent of said prior locators and without any opportunity being given to any of said prior mining locators of any of said lands to be heard in defense of their rights relative to any of said lands under said mining locations or otherwise, and the officers of the Land Department never acquired juris-

diction to cancel, and never did cancel, said prior mining locations, and never acquired jurisdiction otherwise to defeat or in any wise affect any rights of said prior locators, under said prior mining locations, and never attempted or presumed to or did molest or interfere in any way whatsoever with such rights.
[107]

XVII.

These cross-complainants further say and show unto the Court, that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to and submit to and agree to be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said Act and joint resolution, and said patent, or either or any of them, contained, and so accepting the same and assenting and submitting thereto and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the office of the Recorder of the County of Fresno and State of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands, or any part thereof, under or through it by virtue of said Act of Congress and joint resolution and said patent, or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions and reservations, and are in equity and in conscience estopped to resist or deny the binding force and effect

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of the same, or any part of any thereof.

XVIII.

These cross-complainants further say and show, that the lands described in paragraph III of this Cross-Bill are not within the limits of twenty miles of any completed section of twenty-five consecutive miles of the line of the railroad of said defendant, Southern Pacific Railroad Company, as required by Section 4 of said Act and by said Joint Resolution, and are not coterminous with any such completed section of twenty-five consecutive miles of the line of the said railroad, and that the [108] railroad to aid in the construction of which said grant of lands was made, has never been completed, and that all of the lands described in paragraph III of this Cross-Bill lie opposite to and coterminous with an uncompleted section of twenty-five consecutive miles of said railroad line, and that prior to the certification of said list of lands and the issuance of said alleged patent as aforesaid, the said Southern Pacific Railroad Company had received from the United States, for the construction of its said railroad, land to the amount of more than ten alternate odd-numbered sections per mile for all the railroad it has ever constructed under its grant, and that said alleged patent was illegally issued, and was issued without any jurisdiction on the part of any officer or officers of the United States, or any Department thereof, to issue the same, and was issued in violation and in contravention of the provisions of Section 4 of said Act of July 27th, 1866; and these cross-complainants allege and aver that said recommendation of said list of lands for patent

by the Commissioner of the General Land Office, and said approval thereof by said Secretary of the Interior, and the issuance of said alleged patent, were all wholly without authority of law and in contravention and violation of an Act of March 3d, 1887, and that said certification and said alleged patent were and ever have been inoperative, void and of no effect, to pass or confirm to said Southern Pacific Railroad Company or to its successors or assigns, any right, title or interest in or to any of the lands described in paragraph III of this Cross-Bill.

XIX.

These cross-complainants further allege and show, that the lands described in paragraph III of this Cross-Bill were, on, to wit, the 3d day of March, 1909, vacant, unappropriated public mineral lands belonging to the United States, except for the mining locations theretofore made thereon, as alleged in [109] paragraph IX of this Cross-Bill, and that on, to wit, the 3d day of March, 1909, no annual assessment work for the year of 1908 had been done or commenced on any of said prior mining claims, and said lands were open to relocation as placer mining grounds, and that on, to wit, the 3d day of March, 1909, this complaint, and A. L. Frick, M. J. Frick, S. L. Phillips, M. E. Wall, B. McGowan and E. H. Dunweedie, acting as an association of eight persons, entered on said lands and re-located each quarter section thereof as placer mining ground, under and in accordance with the mining laws of the United States and the rules, regulations and customs of Miners in the district where said lands are situated, and posted upon each of said

quarter sections so relocated the notice of such relocation required by law to be posted, and did thereafter and on, to wit, the 6th day of March, 1909, cause copies of each of said relocation notices to be duly recorded in the office of the Recorder for the county of Fresno, State of California, which was then the proper and lawful place for the recordation of mining locations made within said County, where said lands are situated, and did thereby succeed to all the right, title and interest of said prior mining locators, in and to all of said lands and to the discoveries on which said prior mining locations were predicated.

XX.

That contemporaneous with the making of said relocations, there was a discovery of mineral by said relocators on each quarter section or one hundred and sixty acre tract of said land, and prior to said relocations and after the issuance of said patent, said lands had been properly and legally examined by the Department of the Interior and designated by it as lands bearing mineral in commercial quantities and more valuable for mining purposes than for any other purpose. [110]

XXI.

These cross-complainants further say and show that said defendants, Southern Pacific Railroad Company, and Kern Trading and Oil Company, had never, prior to the beginning of this suit, or at any time since, been in actual, open, notorious, exclusive, continuous or hostile possession, or any possession whatsoever, of any of said lands described in paragraph III of this Cross-Bill.

XXII.

These cross-complainants further allege that, subject only to the paramount title of the United States, complainant is the owner and entitled to the possession of all the lands described in paragraph III hereof, as placer mining claims under the mining laws of the United States, to the extent of one-tenth ($1/10$) undivided interest in the whole thereof; that these cross-complainants are the owners in trust for the benefit of a large number of persons, firms and corporations, other than the said defendants, the Southern Pacific Railroad Company and The Kern Trading and Oil Company, and are entitled to the possession of all of said lands described in paragraph III hereof, to the extent of an undivided nine-tenths ($9/10$) thereof, as placer mining claims, subject only to the paramount title of the United States.

XXIII.

These cross-complainants further allege and show that said alleged patent constitutes a cloud upon their said title in and to said lands, and that the reasonable and market value of each of said mining claims is upwards of Sixty Thousand Dollars (\$60,000.00), and that the reasonable and market value of these cross-complainants' said undivided interest in each of said mining claims is upwards of Fifty Thousand (\$50,000.00) Dollars. [111]

XXIV.

These cross-complainants further allege and show that the other defendants herein, claim to have some right, title or interest in or to said premises described in paragraph III hereof, or to some portion

thereof, adverse to these cross-complainants, but that all such claims are illegal and invalid, and they have not, either jointly or severally, any right, title or interest in or to the same, or any part thereof, or in or to any part of the said mining claims now subsisting thereon, and such claims constitute a cloud on the title of these cross-complainants.

WHEREFORE, your cross-complainants pray:—

First: That a construction and interpretation be made by this Court in this suit of Sections 3, 4, 6 and 18, of said Act of Congress approved July 27th, 1866, and of the joint resolution of Congress approved June 28th, 1870, and all the other Acts of Congress mentioned in this Cross-Bill, in relation to their application to the facts and circumstances stated and alleged in this Cross-Bill.

Second: That a construction and interpretation be made by this Court in this suit of the recommendation of the Commissioner of the General Land Office for the certification and approval by the Secretary of the Interior of the said list of lands, and of the approval by the Secretary of the Interior of said recommendation as set forth and alleged in this Cross-Bill, and [112] also of said patent, including the clause in said alleged patent excepting and excluding all mineral lands from conveyance by said alleged patent.

Third: That all of said defendants and said complainants be required to set forth the nature of their respective claims in and to the property described in paragraph III of this Cross-Bill, and that all claims of said defendants and said complainants in or to

said lands and said mining claims, adverse to these cross-complainants, may finally be determined by decree of this Court in this suit.

Fourth: That it may be ordered, adjudged and decreed by this Court in this suit, that none of said defendants, except J. I. Lamprecht and F. M. Aiken, Trustees as aforesaid, have any right, title or interest in or to said lands described in paragraph III of this Cross-Bill or in any part thereof, or in or to said mining claims, or any thereof, and that they and each and all of them are, and that they be estopped from claiming any right, title or interest in or to the same, and that these cross-complainants' title to said lands be quieted.

Fifth: That an interlocutory injunction in due form be issued by this Court, directed to each and all of the cross-defendants herein, except Edmund Burke, commanding them, and each of them, and all other persons claiming under or through them, to refrain and desist from any interference with the property described in paragraph III of this Cross-Bill, or the minerals therein, and from interfering with these cross-complainants' possession thereof, until the final determination of this suit, and that upon final hearing therein said injunction may be made perpetual.

Sixth: That these cross-complainants may have such other, further and different relief, order or decree, the premises being considered, as to the Court may seem just and equitable. [113]

Seventh: That a writ of subpoena of the United States issue, directed to each of the defendants herein, commanding them, on a certain day and under a cer-

tain penalty, to be and appear in this court and there to answer without oath (the answer under oath being hereby expressly waived) the premises, and to stand by and abide the decree and order as may issue against them.

D. J. HINKLEY,

Solicitor for Cross-Complainants.

BLANDIN RICE & GINN,

1300 Schofield Bldg., Cleveland, Ohio,

Of Counsel.

State of California,

County of Los Angeles,—ss.

D. J. Hinkley, being duly sworn, deposes and says that he is solicitor for the above-named cross-complainants; that he has read the foregoing Cross-Bill, and knows the contents thereof; that the same is true, of his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters, he believes them to be true; that said cross-complainants are all nonresidents of the State of California, and are all absent therefrom.

D. J. HINKLEY.

Subscribed and sworn to before me, this 16th day of December, 1910.

[Seal]

M. R. KING,

Notary Public, Los Angeles County, State of California.

My commission expires Aug. 5, 1914. [114]

Exhibit "A."

PATENT.

**TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETINGS:**

WHEREAS by the Act of Congress approved July 27th, 1866, and Joint Resolution of June 28th, 1870, "to aid in the construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast" and to secure to the Government the use of the same for postal, Military and other purposes, authority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the State, to construct a Railroad and Telegraph Line, under certain conditions and stipulations expressed in said Act, from the City of San Francisco to a point of connection with the Atlantic and Pacific Railroad near the boundary line of said State, and provision is made for granting to the said Company, "every alternate section of public land designated by odd numbers, to the amount of twenty alternate *section* per mile on each side of said railroad, on the line thereof, and within the limits of twenty miles on each side of said road" "not sold, reserved, or otherwise disposed of by the United States, and to which pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

AND WHEREAS, Official statements from the Secretary of the Interior, have been filed in the General Land Office, showing that the Commissioners appointed by the President under the provisions of the

fourth section of the said Act of July 27th, 1866, have reported to him, that the line of said railroad and telegraph line from San Jose to *Tre Pimos* and from Alcalde to Mojave, together comprising Two Hundred and Fifty-two miles and four hundred and seventy-nine thousandths of a mile has been constructed and fully completed and equipped in the manner prescribed by said [115] Act of Congress of July 27th, 1866, and accepted by the President.

AND WHEREAS, the following tracts have been duly listed under the Act aforesaid by the duly authorized land agent of the said Southern Pacific Railroad Company, as shown by his original lists of selections approved by the local officers and on file in this office.

AND WHEREAS the said tracts of land lie coterminous to the constructed line of said road and particularly described as follows, to wit:

South of base line and east of Mt. Diablo Meridian,
State of California.

Township Nineteen, Range fifteen.

All of Section 33, containing 640 acres.

(With other land)

The said tracts as described in the foregoing make the aggregate area of 440,900.85 acres.

NOW, KNOW YE, that the United States of America, in consideration of the premises and pursuant to the said Acts of Congress, Have Given and Granted and by these presents do give and grant unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the fore-

going. Yet excluding and excepting "All Mineral Lands," should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute, shall be constructed to include "Coal and Iron Lands."

TO HAVE AND TO HOLD the same with the appurtenances unto the said "Southern Pacific Railroad Company" and to its successors and assigns forever.

IN TESTIMONY WHEREOF, I, GROVER CLEVELAND, President of the United States, have caused these letters to be made patent [116] and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this, the Tenth day of July, in the year of our Lord One Thousand eight hundred and ninety-four and the Independence of the United States, the one hundred and nineteenth.

By the President:

GROVER CLEVELAND.

[Seal]

M. McKEAN,
Secretary.

L. Q. LAMAR,

Recorder of the General Land Office.

Recorded in Vol. 14, pp. 103 to 142, inclusive.

Patent No. 22.

Recorded Feb. 16, 1895, at 8:27 o'clock A. M., in Vol. P. of Patents, page 283 et seq., Fresno County Records.

[Endorsed]: No. 192. Circuit Court of the United States for the Southern District of California, North-

138 *J. I. Lamprecht and F. M. Aiken, Trustees,*
ern Division. In Equity. Edmund Burke, Com-
plainant, vs. Southern Pacific Railroad Company, et
al., Defendants, and J. I. Lamprecht, et al., Cross-
Complainants, vs. Southern Pacific Railroad Com-
pany, et al., Cross-defendants. Cross-bill. Filed
Jan. 10, 1911. Wm. M. Van Dyke, Clerk. By Chas.
N. Williams, Deputy Clerk. D. J. Hinkley, Solicitor
for Cross-complainants. # 1008. Wright & Cal-
endar Building, Los Angeles, California. [117]

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Judicial
Circuit, Southern District of California, North-
ern Division.*

IN EQUITY—No. 192.

EDMUND BURKE,

Complainant,

vs.

THE SOUTHERN PACIFIC RAILROAD COM-
PANY, et al.,

Defendants.

Decree.

This cause having come on regularly for hearing
on the joint and several demurrer of defendants
Southern Pacific Railroad Company and Kern Trad-
ing and Oil Company, to complainant's amended
bill of complaint; on the joint and several demurrer
of defendants, Southern Pacific Railroad Company
and Kern Trading and Oil Company, to the cross-
bill of complaint of John I. Lamprecht and F. M.

Aiken; on the amended demurrer of T. S. Minot, to the first amended bill of complaint, and on the demurrer of defendant, T. S. Minot to the cross-bill of complaint of Jno. I. Lamprecht and F. M. Aiken; and the Court, after hearing arguments of counsel and after due deliberation thereon, thereafter, on the 13th day of March, 1911, having by its order made and entered herein, sustained said demurrers, and having further ordered that the bill of complaint and the cross-bill of complaint be dismissed at the cost of the respective complainants,

NOW, THEREFORE, it is hereby Ordered, Adjudged and Decreed, that the complainant's said bill of complaint and the said cross-bill of complaint of John I. Lamprecht and F. M. Aiken be, and they hereby are dismissed, and that said defendants to the bill of complaint recover from complainant, their, the said defendants', costs incurred herein by reason of the bill of [118] complaint, taxed at \$18.90/100 in favor of defendants, Southern Pacific Railroad Co., and Kern Trading and Oil Company; and that the said defendants to the cross-bill of complaint recover from cross-complainants, their, the said defendants', costs incurred herein by reason of the said Cross-bill of Complaint, taxed at \$.40/100 in favor of Southern Pacific Railroad Company and

140 *J. I. Lamprecht and F. M. Aiken, Trustees,*
Kern Trading and Oil Company.

Los Angeles, March 21, 1911.

ROSS,
Circuit Judge.

Decree entered and recorded March 21st, 1911.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: No. 192. U. S. Circuit Court, Ninth Circuit, Southern District of California, Northern Division. Edmund Burke, Complainant, vs. The Southern Pacific Railroad Company, et al., Defendants. Decree. Filed Mar. 21, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.
[119]

[Opinion.]

*In the United States Circuit Court in and for the
Southern District of California, Northern Di-
vision.*

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,
et als.,

Defendants.

The views expressed in the opinion delivered in the case of Roberts et al. vs. Southern Pacific Railroad Company, just decided, applied to this case, makes necessary the sustaining of the demurrers to

the bill and cross-bill and their dismissal at the cost of the respective complainants. An order to that effect will be entered.

[Endorsed]: No. 192. In the United States Circuit Court, Ninth Judicial Circuit, Southern District of California, Northern Division. Edmund Burke vs. Southern Pacific Railroad Company, et al., Opinion. Filed Mar. 13, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [120]

**[Opinion in Roberts et al. v. Southern Pacific
Company et al.]**

*In the United States Circuit Court in and for the
Southern District of California, Northern Di-
vision.*

GEORGE D. ROBERTS et al.,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY et als.,

Defendants.

Stripped of the mass of irrelevant and redundant matter contained in the pleadings, the case presented is this: Can a citizen of the United States, or one having declared his intention to become such, lawfully enter upon and claim as mineral ground land theretofore patented by the Government to a railroad company under a congressional grant, such patents, after describing the land thereby conveyed, containing the clause, "Yet excluding and excepting 'all mineral lands,' should any such be found in the tracts aforesaid. But this exclusion and exception,

according to the terms of the statute, shall not be construed to include 'coal and iron land.' "

The complainants' alleged rights to the lands in question in this suit were, according to their express allegation, not acquired until 15 years after the issuance of patents to the Southern Pacific Railroad Company therefor, at which time they claim to have made mineral locations upon them, and by this suit, the nature of which is variously characterized by their counsel, they ask the Court to protect their alleged rights as such mineral locators, by some sort of injunctive process, by "controlling" the patents which were issued by the Government, [121] and which they expressly alleged conveyed the legal title to the land to the grantee therein named.

If the above quoted clause inserted in the patents had the effect of excepting from the lands described in the granting clause thereof all of such lands in which mineral might thereafter be found, the discovery of mineral in the lands in suit by the complainants, if such has been made as alleged, 15 years after the issuance of the patents, would undoubtedly defeat the grant under which the defendants hold, for the reason that the clause is without limitation as to time, and a determination by a court or jury, as the case might be, at any subsequent date, however remote, that any of the land described in the granting clause of the patents had turned out to be mineral land, would thereby necessarily determine that such land was never within the terms of the railroad grant made by Congress, notwithstanding the fact that the officers of the Government, charged

with the duty of inquiring into and determining the question and of issuing the Government patent for the lands granted, had issued such conveyance. A mere statement of the necessary consequences of the complainants' contention is enough to show that it cannot be sound. It would make of the patents a delusion and a snare instead of a muniment of title designed for the peace and security of those holding under them. Undoubtedly, if the lands in suit were known to be mineral lands at the time they were applied for by the railroad company under the congressional grant to it, and if the patenting of them was, as alleged by the complainants, procured by means of the false affidavit of its land agent, or through any other fraud on its part, the Government, or anyone in privity with the Government, could justly complain and by suit, brought within the time fixed by Congress for that purpose, procure a cancellation of such patents. But this is not such a suit. Neither the Government, nor anyone [122] in privity with the Government title, is here complaining. The suit is by strangers to that title, for by the express averments of the bill, the complainants' alleged rights were not initiated until years after the issuance of the patents which they expressly allege conveyed to the railroad company the legal title to the lands. That the complainants cannot be heard to complain of the alleged frauds upon the Government is thoroughly settled by decisions so numerous as to make their citation unnecessary. They must be familiar to all lawyers at all acquainted with the law in respect to the

public lands. The only real question, therefore, in the case is whether the lands in suit are excluded from the patents by reason of the alleged subsequent discovery of mineral therein by the complainants, under the exception clause inserted in the patents, already quoted, but which I here repeat:

“Yet excluding and excepting ‘all mineral lands,’ should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include ‘coal and iron lands.’ ”

Where did the officers of the Government, charged with the duty of issuing patents for lands granted by Congress, get authority to cast upon courts or juries the duty or power of ascertaining and determining the character of the public lands applied for under the grant, which Congress devolved upon the Land Department of the Government as a prerequisite to the issuance of a patent therefor? The statutes of the United States will be searched in vain for any such authority, unless it can be deduced from the Joint Resolution of Congress of June 28, 1870 (16 Stats. 382), relating to the grant to the Southern Pacific Railroad Company made by its preceding act of July 27, 1866 (14 Stats. 292).

By the latter act Congress chartered the Atlantic and Pacific Railroad Company, empowered it to build a railroad commencing [123] at a point at or near Springfield, Missouri, along a generally described route to the Colorado River, and, after crossing that river, by the most practicable and eligible route to the Pacific Ocean—granting to such com-

pany by the third section of the Act:

“Every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office.”

The 18th section of the Act made a grant to the Southern Pacific Railroad Company, and is as follows:

“And be it further enacted, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.”

By section 4 of the Act it was provided that whenever the Railroad Company "shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the [124] service contemplated, the President of the United States shall appoint three Commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

As recited in the foregoing Act of Congress, the Southern Pacific Railroad Company was a corporation of the State of California, and by its charter was authorized to build a railroad "from some point on the Bay of San Francisco, in the State of Cali-

fornia, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego to the eastern line of said State of California, there to connect with a contemplated railroad from said eastern line of the State of California to the Mississippi River."

The Act of 1866, as has been seen, authorized the Southern Pacific Railroad Company to connect with the Atlantic and Pacific Railroad "at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line [125] to San Francisco." That company undertook to lay out a different route from that designated in its articles of incorporation, and on the 3d day of January, 1867, filed with the Commissioner of the General Land Office a map showing the line of route so adopted by the company, and on the 4th of the succeeding month the then Secretary of the Interior directed the Commissioner of the General Land Office to cause to be withdrawn from sale or disposal the odd sections within the granted limits of twenty miles on each side of the road, as shown on the map so filed January 3, 1867, and also the odd sections outside of the twenty miles and within thirty miles on each side of the said route, from which indemnity for land otherwise disposed of by the Government within the granted limits should be taken. July 14, 1868, the said order of withdrawal was revoked and the lands included therein were opened to sale. On the 20th of August following the latter order was suspended, so far as it related to lands south of San Jose, California, and Novem-

ber 2 and 11, 1869, the then Secretary of the Interior revoked the suspension of August 20, 1868, and directed the restoration to sale, after sixty days' notice of the lands included in the suspension order. On the 15th of the next month the orders of November 2 and 11, made the preceding month, were suspended. (Opinions of Attorney General, Vol. 16, pp. 80-89). July 25, 1868, the time for the construction of the road by the Southern Pacific Railroad Company was extended by Congress (15 Stats. 187), and on June 28, 1870, Congress passed the Joint Resolution in question, which is here set out in full:

“Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section [126] by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been

constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

In their brief counsel for the complainants ask the court to "account for, explain, construe, interpret, and apply" the foregoing saving clause. The reason for and purpose of it is quite fully set forth in the debate in the Senate upon the resolution, where it was first introduced (Congressional Record, part V, 2nd Session, 41 Congress 1869-1870, pp. 3950, 3951, 3952, 3953).

While asking the Court to account for and explain the clause, counsel at the same time assert that the Court is not at liberty to refer to the debate in the Senate upon the subject. It is quite true that the meaning of the clause is to be determined from the language used by Congress, but counsel are mistaken in supposing and asserting it to be improper for the Court to refer to the debate. In *Binns v. United States*, 194 U. S. 486, 495, the Supreme Court said:

"While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language

of a statute passed by that body, United [127] States v. Freight Association, 166 U. S. 290, 318, yet it is also true that we have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports. *Holy Trinity Church v. United States*, 143 U. S. 457, 464. When sections 461 and 462 were under consideration in the Senate the chairman of the Committee on Territories, in response to inquiries from Senators, made these replies:

“The Committee on Territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the Government of the Territory of Alaska. * * * They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the Territory of Alaska, including the governor and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions and upon the information of the committee derived from conversing with them.’ Vol. 32, Congressional Record, Part III, page 2235.”

In *Jennison v. Kirk*, 98 U. S. 453, the same Court, in construing an act of Congress and in referring to and setting forth certain statements of one of the Senators made in the Senate, said:

“These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of [128] mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the act.”

In the case of *People v. Stephens*, 62 Cal. 209, 235, 236, the Supreme Court of California, in construing one of the provisions of the constitution of the State, referred to the purpose of the provision as explained in the debates in the constitutional convention by the member at whose instance it was inserted and became a part of the constitution. See also *Wadsworth v. Boisen*, 148 Fed. 771, 778; *Ho Ah Kow v. Nunan*, Fed. Case No. 6546.

Turning to the debate in the Senate upon the saving clause added to the joint resolution of June 28, 1870, it is readily seen that its purpose was to protect those settlers who had located upon public lands along the line of the proposed changed route of the Southern Pacific Railroad Company, as indicated by the map filed by that company in the General Land Office on the 3rd of January, 1867. By the Joint Resolution Congress sanctioned the change of route and made to the Southern Pacific Railroad Company

a precisely similar grant of land on each side of that line that it had made to the same company by the 18th section of the act of July 27, 1866, on each side of the line of road therein authorized; but to protect not only those who had acquired or might acquire prior to the attaching of the grant a legal right to lands along the line of the changed route, but also all *actual* settlers thereon, Congress provided in and by the Joint Resolution that the change of route thereby authorized and the grant of lands thereby made should not affect the rights of any actual settler, and further that the grant of lands thereby made to the Southern Pacific Railroad Company along the new route was and should be subject to the same conditions and restrictions as applied to the original grant made to that company in and by the [129] act of July 27, 1866—the language of the Joint Resolution being, as has been seen: “Expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.”

Those conditions and restrictions are specifically stated in the Act of 1866 and are, in substance, that the grant should not apply to any mineral land nor to any land reserved, sold, granted or otherwise appropriated, nor to any land to which the United States did not have full title and which was not free from pre-emption or other claims or right at the time the line of the road should be designated by a plat thereof filed in the office of the Commissioner of the General Land Office. Such are the express provisions of the grant of July 27, 1866, expressly

referred to in the Joint Resolution for the conditions and restrictions of the grant of the lands thereby made along the line of road thereby authorized to be built. There is absolutely nothing in the saving clause of the Joint Resolution, in my opinion, either requiring or authorizing the patents thereby directed to be issued for the granted lands to contain those conditions or restrictions, or any of them. If such patents were thereby required or authorized to contain one of the conditions or restrictions, then manifestly they were required to contain all of them, for no distinction is made between them by Congress and none can be found in the language of its acts in question. Clearly, therefore, if the contention of the complainants' counsel is correct, that by the Joint Resolution of June 28, 1870, Congress required that the patents to be issued to the railroad company for lands within the grant made to it should contain an exception of all mineral lands, they were likewise required to contain a similar exception of all lands reserved, sold, granted or otherwise appropriated, and all land to which the United States did not have [130] full title and which was not free from pre-emption or other claims or rights at the time the line of the grantee's road was designated by a plat thereof filed in the office of the Commissioner of the General Land Office. There is no escape from this conclusion for I repeat that the statute makes no distinction between the conditions and restrictions of the grant, save only the rights of actual settlers therein expressly specified, and no distinction in the other conditions and restrictions of this grant has been or

can be suggested by counsel for the simple reason that the statute contains none. The result is that, according to the contention of counsel for the complainants, we would have Congress providing for the issuance of Government patents for lands under its grant which upon their face would leave open for all time, to be decided by courts or juries, as the case might be, not only the question as to the character of the land patented but also as to whether it had been reserved, sold, granted or otherwise appropriated, and as to whether the United States had full title, and whether it was free from pre-emption or other claims or rights at the time the railroad company designated the line of its road by filing a plat thereof in the office of the Commissioner of the General Land Office. As a matter of course, Congress never intended anything of the sort, and there is nothing in the acts in question nor in any other grant to any railroad company that has ever come under my observation, or in any decision of the Supreme Court, that gives any support to any such conclusion.

The patent was the last step in the proceedings provided for by Congress and was designed, as the statute expressly declares, to convey the Government title to the grantee. Of what avail would such an instrument, intended for the peace and security of the holder, be if the antecedent facts upon which it is required to be based are open to subsequent inquiry and contestation [131] by strangers to the title? As well might it be contended that questions of fact in respect to the marking of the boundaries of a patented mining claim or the previous discovery of

mineral therein, or any other fact made essential by the statute to the issuance of a mining patent, are open to inquiry by the courts subsequent to its issue. In respect to such a contention this Court said in the case of *Doe v. Waterloo Mining Co.*, 54 Fed. 935, 940:

“If the rights conferred by the patent can be defeated by showing a want of parallelism of the end lines in the original location, it is difficult to understand why the patent may not likewise be defeated by showing that the original location was void because its boundaries were not properly marked upon the ground, or because no vein, lode, or ledge was discovered within them, or because the statutory requirement in respect to the posting of the notice of location was not complied with, or because of an omission on the part of the locator to comply with any other provision of the statute regarding the location of such lode claims. All such matters I understand to be absolutely concluded by the patent so long as it stands unrevoked. If questions relating to the boundaries of the location, the marking of them, the discovery of a vein, lode, or ledge within them, the posting of the required notice, etc., are open to contestation after the issuance of a patent for the claim as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based.”

Great reliance is placed by counsel for the com-

plainants on this clause from the opinion of the Supreme Court in the case of *Barden v. Northern Pacific Railroad Co.*, 154 U. S. 288: [132]

“The delay of the Government in issuing a patent to the plaintiff, of which great complaint is made, does not affect the power of the company to assert, in the meantime, by possessory action, (as held in *Deseret Salt Company v. Tarpey*, 142 U. S. 241,) its right to lands which are in fact nonmineral. But such delay, as well observed, cannot have the effect of entitling it to recover, as is contended in this case, lands which it admits to be mineral. The Government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein.”

The observation that “the Government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent” is very far from saying, much less deciding, that a patent issued for lands in pursuance of such a grant must or may except from the lands described in the granting clause thereof all mineral lands. The Court could not have so decided in that case, for there was no such question before the Court, and could not have been, as no patent had been issued in

the case there under consideration. It was an action by the Northern Pacific Railroad Company to recover certain lands, confessedly mineral in character, as a part of its land grant, which grant, like the one here in question, excluded all mineral land therefrom, on the ground that when that grant became attached to the various sections within it by the definite location of the company's line [133] of road, the land in suit was not known to be mineral land; and the question in the case, as will be readily seen from the prevailing as well as the dissenting opinions, was whether that fact entitled the railroad company to the land sued for as part of its grant, or whether such land was excluded from the grant by the discovery of its mineral character at any time prior to the issuance of the Government patent therefor. The majority of the court held that the character of the land was open to inquiry at any time prior to the issuance of the patent, and that the discovery of its mineral character at any time before it was patented necessarily excluded it from the grant, because the grant was of nonmineral land only. But the Court in the prevailing opinion distinctly pointed out that the duty of ascertaining and determining the character of the land rested upon the officers of the Land Department, and there is, I think, nothing in it even tending to show that that or any other matter of fact could be left by them to the ascertainment and determination of a Court or jury subsequent to the issuance of the Government patent. The Court said:

“The law places under the supervision of the Interior Department and its subordinate officers, acting

under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called [134] for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. The act of Congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands in the direction for such patent to issue, the Land Office can examine into the character of the lands and designate it in its conveyance.

“It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake,

its determination is conclusive against collateral attack.

“In *Smelting Co. v. Kemp*, 104 U. S. 636, 640, 641, this court thus spoke of the Land Department in the transfer of public lands: ‘The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out the Land Department, as part of the administrative and executive branch of the Government, has been created to supervise all the various proceedings taken to obtain title from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has [135] been held in various instances by this Court that their judgment as to matters of fact properly determinable by them is conclusive, when brought to notice in a collateral proceeding. Their judgment in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the Government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument,

duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action of law.'

"In *Steele v. Smelting Co.*, 106 U. S. 447, 450, the language of the Court was that: 'The Land Department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation.'

"In *Heath v. Wallace*, 138 U. S. 573, 585, it was held that 'the question whether or not lands returned as "subject to periodical overflow" are "swamp and overflowed lands" is a question of fact properly determinable by the Land Department.' And Mr. [136] Justice Lamar added: 'It is settled by an unbroken line of decisions of this Court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction are, in the ab-

sence of fraud or imposition, conclusive and binding on the courts of the country.' If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the Secretary of the Interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in *Knight v. Land Association*, 142 U. S. 161, 178, as the 'supervising agent of the Government to do justice to all claims and preserve the rights of the people of the United States,' by certifying the list until corrected in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain.

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy

whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such [137] cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive.

“In the case of the Central Pacific Railroad Company v. Valentine, 11 Land Dec. 238, 246, the late Secretary of the Interior, Mr. Noble, speaks of the practice of the Land Department in issuing patents to railroad lands. His language is: ‘The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the Land Department that ever since the year 1867 (the date when that division was organ-

ized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, [138] in effect, become a rule of property.'

"It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the Government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the Government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the Government to the grantees, reposes in officers of the Land Department. Until such patent is issued, defining the character of the land granted and showing that it is nonmineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to nonmineral lands; but a patent issued in proper

form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were nonmineral, would unless set aside and annulled by direct proceedings, estop the Government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

I do not find in this language of the prevailing opinion in the Barden case any support for the contention of the complainants' counsel that the officers of the Land Department were required or authorized to insert in the patents here in question, or in any other similar patent, after describing the lands falling within the railroad grant, a clause "excluding and excepting [139] all mineral lands, should any such be found in the tracts aforesaid." And that the Supreme Court itself takes the same view of the decision in the Barden case is, I think shown by its reference thereto in the case of *Shaw v. Kellogg*, 170 U. S. 313, where, at page 339, it says:

"Defendant relies largely on the decision of this Court in *Barden v. Northern Pacific Railroad*, 154 U. S. 288, in which it was held that lands identified by the filing of the map of definite location as within the scope of the grant made by Congress to that company, although at the time of the filing of such map not known to contain any mineral, did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is

true there was a division of opinion, but that division was only as to the time at which and the means by which the nonmineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original Act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be 'construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,' held that the question of mineral or nonmineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals."

I am also of the opinion that the case last referred to—*Shaw vs. Kellogg*—is direct authority for the proposition that the officers of the Land Department had no authority to insert [140] in the patents under consideration the clause excepting from the lands described in its granting clause "all mineral lands, should any such be found in the tracts aforesaid." The grant involved in *Shaw v. Kellogg* was made by section 6 of an act of Congress passed June 21, 1860 (12 Stats. 71), in settlement of a claim under a Mexican grant to land in the vicinity of Los Vegas by which the claimants were given an equal amount of nonmineral and vacant land to be by them elsewhere selected in the territory of New Mexico, to be

located in a certain form and within a certain time. It was by the act made the duty of the surveyor general of New Mexico to make survey and location of the land so selected. The grantees made their selection and applied for the land. Certain correspondence occurred between the Land Department and the surveyor general in respect to the form of the application and in respect to the evidence relating to the character of the land, that is to say, whether or not it was mineral land, which resulted in the Land Department instructing the surveyor general to approve the selection and make a survey thereof. The Land Department subsequently approved the survey, field-notes and plat of the surveyor general, but in doing so added the words, "Subject to the conditions and provisions of Section 6 of the Act of Congress approved June 21, 1860," which, as has been seen, excluded mineral land from the grant. The Act of Congress did not provide for the issuance of a patent, but the Land Department noted on its maps that this tract had been segregated from the public domain and had become private property and so reported to Congress, which never questioned the validity of such action. The grantees were also notified and took possession of the land. Many years afterwards a portion of it was claimed as mineral land by a party whose contentions were thus stated by the Supreme Court in its opinion: [141]

"These contentions are that Congress granted only nonmineral lands; that this particular tract is mineral land, and therefore by the terms of the act is not within the grant; that no patent has ever been issued,

and *thereof* the legal title has never passed from the Government; that the Land Department never adjudicated that this was nonmineral land, but on the contrary, simply approved the location, subject to the conditions and provisions of the act of Congress, thereby leaving the question of title to rest in perpetual abeyance upon possible future discoveries of mineral within the tract."

In considering the limitation undertaken to be imposed by the Land Department upon its approval of the selection of the land by the grantees and the surveyor general's survey, field-notes and plat thereof, the Supreme Court said:

"What is the significance of, and what effect can be given to the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of the opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty

to decide the question—a duty which it could not avoid or evade. It could not say to the [142] locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. The general statutes of Congress in respect to homestead, pre-emption and townsite locations provide that they shall be made upon lands that are nonmineral, and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the Land Department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land or else denying it altogether. As said in *Deffeback v. Hawks, supra*, 406:

“ ‘The position that the patent to the plaintiff should have contained a reservation excluding from its operation all building and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed.’ ”

It results from what has been said that the demur-

rers must be, and are, sustained and the bills dismissed at the complainant's cost.

ROSS,

Circuit Judge. [143]

[Endorsed]: No. 177. In the United States Circuit Court, Ninth Judicial Circuit, Southern District of California, Northern Division. George D. Roberts et al. vs. Southern Pacific Company et al. Opinion of the Court. Filed Mar. 13, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [144]

In the Circuit Court of the United States for the Southern District of California, Northern Division.

IN EQUITY—No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY
et al.,

Defendants,

and

J. I. LAMPRECHT et al.,

Cross-Complainants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY
et al.,

Cross-Defendants.

Stipulation [as to Amendment of Record].

It is hereby stipulated and agreed by and between

170 *J. I. Lamprecht and F. M. Aiken, Trustees,*

J. I. Lamprecht and F. M. Aiken, Trustees, cross-complainants in the above-entitled cause, and Southern Pacific Railroad Company and The Kern Trading and Oil Company, cross-defendants in said cause, by their respective solicitors, that to amend the record an order may be made and entered in said cause as of the 11th day of January, 1911, that the Cross-Complaint filed in said cause by said cross-complainants on the 10th day of January, 1911, stand and be taken as the Cross-Complaint of said cross-complainants in said cause; and that the joint and several demurrer of said cross-defendants, Southern Pacific Railroad Company and The Kern Trading and Oil Company, filed on the [145] eleventh day of November, 1910, to the Cross-Complaint filed on behalf of said cross-complainants on the 31st day of October, 1910, stand as the joint and several demurrer of said cross-defendants, Southern Pacific Railroad Company and The Kern Trading and Oil Company, to said Cross-Complaint filed on the 10th day of January, 1911, as was intended by stipulation by and between said parties filed in said cause on January 9th, 1910.

April 4th, 1911.

DELBERT J. HINKLEY and
BLANDIN, RICE & GINN,
Solicitors for Cross-Complainants.
WM. SINGER,
GUY V. SHOUP and
D. V. COWDEN,
Solicitors for Cross-Defendants.

[Endorsed]: No. 192. Circuit Court of the United States for the Southern District of California, Northern Division. In Equity. Edmund Burke, Complainant, vs. Southern Pacific Railroad Co. et al., Defendants, and J. I. Lamprecht et al., Cross-complainants, vs. Southern Pacific Railroad Co. et al., Cross-defendants. Stipulation. Filed Apr. 6, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [146]

In the Circuit Court of the United States, for the Southern District of California, Northern Division.

IN EQUITY—No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY
et al.,

Defendants,

and

J. I. LAMPRECHT et al.,

Cross-Complainants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY
et al.,

Cross-Defendants.

Order [Amending Record].

At a session of said court held in the courtroom in the Federal Building in the City of Los Angeles on the 5th day of April, 1911. Present—Honorable WILLIAM W. MORROW, Circuit Judge.

Upon the reading and filing of stipulation by and between J. I. Lamprecht and F. M. Aiken, Trustees, cross-complainants in the above-entitled cause, and Southern Pacific Railroad Company and The Kern Trading and Oil Company, cross-defendants in said cause, by the respective solicitors, for amendment of the record in said cause, [147]

IT IS ORDERED as of the 11th day of January, 1911, that the cross-complaint filed in said cause on the 10th day of January, 1911, stand as the cross-complaint of said cross-complainants; and that the joint and several demurrer of said cross-defendants, Southern Pacific Railroad Company and The Kern Trading and Oil Company, filed on the 11th day of November, 1910, to a cross-complaint filed on behalf of said cross-complainants, J. I. Lamprecht and F. M. Aiken, on the 31st day of October, 1910, stand as the joint and several demurrer of said cross-defendants, Southern Pacific Railroad Company and The Kern Trading and Oil Company, to said cross-complaint filed on the 10th day of January, 1911.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: #192. In the Circuit Court of the United States for the Southern District of Califor-

nia, Northern Division. In Equity. Edmund Burke, Complainant, vs. Southern Pacific Railroad Company et al., Defendants, and J. I. Lamprecht et al., Cross-complainants, vs. Southern Pacific R. R. Co. et al., Cross-defendants. Order Amending the Record. Filed Apr. 6, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [148]

[Petition for Appeal.]

*In the Circuit Court of the United States for the
Southern District of California, Northern Di-
vision.*

IN EQUITY—No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC R. R. CO. et al.,

Defendants,

and

J. I. LAMPRECHT and F. M. AIKEN, Trustees,

Cross-Complainants,

vs.

SOUTHERN PACIFIC R. R. CO., THE KERN
TRADING & OIL CO. et al.,

Cross-Defendants.

The above-named cross-complainants conceiving themselves aggrieved by the decree made and entered on the twenty-first day of March, Nineteen Hundred and Eleven (March 21st, 1911), in the above-entitled case, do hereby appeal from said order and decree to

174 *J. I. Lamprecht and F. M. Aiken, Trustees,*

the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that this Appeal may be allowed and that a transcript of the record, proceeding and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

E. J. BLANDIN and

D. J. HINKLEY,

Solicitors for Cross-Complainants.

Dated: June 20th, 1911. [149]

[Endorsed]: No. 192. In the Circuit Court of the United States for the Southern District of California, Northern Division. In Equity. Edmund Burke, Complainant, vs. Southern Pacific R. R. Co. et al., Defendants, and J. I. Lamprecht and F. M. Aiken, Trustees, Cross-complainants, vs. Southern Pacific R. R. Co., The Kern Trading & Oil Co. et al., Cross-defendants. Petition for Appeal. Filed Jun. 21, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Blandin, Rice & Ginn, and D. J. Hinkley, #1008 Wright & Callender Building, Los Angeles, California, Solicitors for Cross-complainants. [150]

*In the Circuit Court of the United States for the
Southern District of California, Northern Di-
vision.*

IN EQUITY—No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC R. R. CO. et al,

Defendants,

and

J. I. LAMPRECHT and F. M. AIKEN, Trustees,

Cross-Complainants,

vs.

SOUTHERN PACIFIC R. R. CO., THE KERN
TRADING & OIL CO., et al.,

Cross-Dedendants.

Assignment of Errors.

And now come the said cross-complainants and say that in the record and the proceedings of the said Court in the above-entitled cause and in the final decree made and entered therein on the twenty-first day of March, nineteen hundred and eleven, there is manifest error, and for errors the said cross-complainants assign the following:

FIRST: The Court erred in that it held, upon the admissions of the demurrer, that the lands described in the Cross-Complaint have been patented by the United States Government under a grant of lands made to the Southern Pacific Railroad Company of California by Act of Congress approved July 27,

176 *J. I. Lamprecht and F. M. Aiken, Trustees,*
1866 (14 Statutes 292) and Joint Resolution of Congress approved June 28, 1870 (16 Statutes 382).
[151]

SECOND: The Court erred in that it held, upon the admissions of the demurrer, that the clause:

“Yet excepting and excluding all mineral lands should any such be found in the tracts aforesaid; but this exclusion and exception according to the terms of the Statute shall not be construed to include ‘coal and iron lands,’ ”

in the patent, pleaded in the Cross-Complaint in this cause, is not effective to save and reserve the lands described in said Cross-Complaint from conveyance by said Acts of Congress and said patent.

THIRD: The Court erred in that it held, upon the admissions of the demurrer, that to hold that said excluding and excepting clause was and is effective to exclude and except the land described in the Cross-Complaint from the conveyance of said Acts of Congress and said patent, would render said patent a delusion and a snare instead of a muniment of title designed for the peace and security of those holding under it.

FOURTH: The Court erred in that it held, upon the admissions of the demurrer, that cross-complainants are not in privity with the Government title of the lands described in Cross-Complaint.

FIFTH: The Court erred in that it held that Congress has by law made a determination, by the officers of the Land Department, that all lands described in said patent are nonmineral in character, a necessary prerequisite to the issuance of said patent.

SIXTH: The Court erred in that it held, in effect, upon the admissions of the demurrer, that the patent pleaded in this case is conclusive evidence that the officers of the Interior Department decided before they issued the same, that the lands described in said Cross-Complaint were nonmineral.

SEVENTH: The Court erred in that it held that said Joint Resolution of Congress, did not authorize, or recognize [152] the authority of the Secretary of the Interior to cause said excluding and excepting clause to be inserted in said patent.

EIGHTH: The Court erred in that it held that the debates in the United States Senate on said Joint Resolution show that it was not the intention of Congress in passing said resolution to authorize, or to recognize the authority of, the Secretary of the Interior to save and reserve all mineral lands from conveyance by said Acts and said patents by inserting in said patent said saving and reserving clause.

NINTH: The Court erred in that it held that the Secretary of the Interior had not authority independent of said Joint Resolution, to insert said saving and reserving clause in said patent.

TENTH: The Court erred in that it held that, if said Joint Resolution be construed to *require* or *authorize* the said patent to contain said clause saving and reserving from the conveyance of said Acts and patent mineral lands, (which did not and could not appear of record as such), it must also be construed to *require* said patent to contain a clause saving and reserving from the conveyance of said Acts and patent, all lands within the limits of the

grant to which the United States had not full title and also those which were reserved, sold, granted or otherwise appropriated or were not free from pre-emption or other claim or rights at the time the line of said Road was designated by a plat thereof filed in the Office of the Commissioner of the General Land Office (which facts would necessarily appear of record).

ELEVENTH: The Court erred in that it did not hold that said Acts of Congress are laws as well as grants and are not subject to the rule of construction of private conveyances that an exception in terms as broad as the grant is void.

TWELFTH: The Court erred in that it did not hold that both known and unknown mineral lands are by law excluded [153] from the conveyance of said Acts and said patent.

THIRTEENTH: The Court erred in that it did not hold that the said Acts passed a present title to the grantees therein named of all lands thereby granted and that the officers of the Government could neither increase nor diminish such grant.

FOURTEENTH: The Court erred in that it did not hold, upon the admissions of the demurrer, that it appeared affirmatively upon the face of said patent and also upon the face of the record of the proceedings wherein said patent was issued, that the officers of the Land Department have never determined that the lands described in the Cross-Complaint were not mineral, and that no presumption that such determination has been made does or could arise from or exist in the face of said patent or the findings of

the officers of the Land Department upon which the patent was issued.

FIFTEENTH: The Court erred in that it did not hold, upon the admissions of the demurrer, that the patent pleaded in the Cross-Complaint, is inoperative and of no effect to pass title to the lands described in the Cross-Complaint.

SIXTEENTH: The Court erred in that it did not hold, upon the admissions of the demurrer, that said patent is, in this suit, valid, effective and conclusive according to its terms, import and intent as expressed by the language of the patent itself.

SEVENTEENTH: The Court erred in that it did not hold, upon the admissions of the demurrer, that the grant of lands made by said Act and Joint Resolution was of ten alternate odd-numbered sections per mile of road constructed under said Act as stated in said Act, instead of twenty alternate odd-numbered sections per mile of road constructed under said Act as stated in the patent pleaded in said Cross-Bill.

EIGHTEENTH: The Court erred in that it did not hold, [154] upon the admissions of the demurrer, that the cross-defendant, Southern Pacific Railroad Company, released to the United States all its right, title, interest and claim in and to the land described in the Cross-Complaint upon acceptance by it of the patent pleaded in the Cross-Complaint.

NINETEENTH: The Court erred in that it did not hold that the Cross-Complaint states a good cause of suit to which the said cross-defendants, Southern Pacific Railroad Company, and The Kern Trading

180 *J. I. Lamprecht and F. M. Aiken, Trustees,*
& Oil Company, should be required to file their answer
or plea.

TWENTIETH: The Court erred in that it made and entered in said cause an order and a decree sustaining the joint and several demurrer of Southern Pacific Railroad Company and The Kern Trading & Oil Company to and dismissing the said Cross-Complaint.

TWENTY-FIRST: The Court erred in that it made and entered in said cause an order and a decree sustaining the demurrer of T. S. Minot to said Cross-Complaint, and dismissing said Cross-Complaint as against him.

Dated: June 20, 1911.

E. J. BLANDIN and
D. J. HINKLEY,

Solicitors for Cross-complainants, #1008 Wright &
Callender Building, Los Angeles, California.

[Endorsed]: No. 192. In the Circuit Court of the United States for the Southern District of California, Northern Division. In Equity. Edmund Burke, Complainant, vs. Southern Pacific R. R. Co. et al., Defendants, and J. I. Lamprecht and F. M. Aiken, Cross-complainants, vs. Southern Pacific R. R. Co., The Kern Trading & Oil Co. et al., Cross-defendants. Assignment of Errors. Filed Jun. 21, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Blandin, Rice & Ginn, and D. J. Hinkley, #1008 Wright & Callender Building, Los Angeles, California, Solicitors for Cross-complainants. [155]

[Order Allowing Appeal.]

*In the Circuit Court of the United States for the
Southern District of California, Northern Di-
vision.*

IN EQUITY—No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC R. R. CO. et al.,

Defendants,

and

J. I. LAMPRECHT and F. M. AIKEN, Trustees,

Cross-Complainants,

vs.

SOUTHERN PACIFIC R. R. CO., THE KERN
TRADING & OIL CO. et al.,

Cross-Defendants.

On this 20th day of June, 1911, came the cross-complainants in the above-entitled cause, by their counsel, and presented their petition for an appeal and an Assignment of Errors accompanying the same, which petition upon consideration of the Court is hereby allowed and the Court allows the appeal of said cross-complainants from the order and decree entered in said cause to the United States Circuit Court of Appeals for the Ninth Circuit, upon the furnishing of a bond, as provided by law, in the sum of Five Hundred (\$500.00) Dollars.

WM. W. MORROW,

Judge of ———.

Dated: June 20th, 1911. [156]

182 *J. I. Lamprecht and F. M. Aiken, Trustees,*

[Endorsed]: No. 192. In the Circuit Court of the United States for the Southern District of California, Northern Division. In Equity. Edmund Burke, Complainant, vs. Southern Pacific R. R. Co. et al., Defendants, and J. I. Lamprecht and F. M. Aiken, Trustees, Cross-Complainants, vs. Southern Pacific R. R. Co., The Kern Trading & Oil Co. et al., Cross-defendants. Order Allowing Appeal. Filed Jun. 21, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Blandin, Rice & Ginn, and D. J. Hinkley, #1008 Wright & Callender Building, Los Angeles, California. Solicitors for Cross-complainants. [157]

AMERICAN SURETY COMPANY
OF NEW YORK.

CAPITAL AND SURPLUS, \$5,000,000.

(CUT)

COMPANY'S OFFICE BUILDING,
100 Broadway, New York.

*In the Circuit Court of the United States for the
Southern District of California, Northern Di-
vision.*

IN EQUITY—No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC R. R. Co. et al.,

Defendants,

and

J. I. LAMPRECHT and F. M. AIKEN, Trustees,
Cross-Complainants,
vs.

SOUTHERN PACIFIC R. R. Co., THE KERN
TRADING & OIL CO. et al.,
Cross-Defendants.

Costs Bond on Appeal.

Whereas, J. I. Lamprecht and F. M. Aiken, Trustees, cross-complainants in the above-entitled action, have presented their petition for an Appeal from the order and decree heretofore entered in the above-entitled court, which petition prays that said appeal be allowed to be taken to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and

Whereas, the above-entitled court has granted said petition upon the furnishing of a bond by said cross-complainants in the sum of Five Hundred Dollars (\$500.00). [158]

NOW, THEREFORE, the undersigned, the AMERICAN SURETY COMPANY OF NEW YORK, a corporation organized and existing under and by virtue of the laws of the State of New York, and duly authorized to transact business in the State of California, are held and firmly bound unto Southern Pacific Railroad Co., The Kern Trading & Oil Co. and T. S. Minot in the sum of Five Hundred Dollars, lawful money of the United States, in consideration of the premises and of the taking of said Appeal to the effect that said cross-complainants will pay all costs charges which may be awarded against

184 *J. I. Lamprecht and F. M. Aiken, Trustees,*

them on said Appeal or on withdrawal or dismissal thereof not exceeding the said sum of Five Hundred Dollars.

IN WITNESS WHEREOF, The said American Surety Company of New York has hereunto caused its name and corporate seal to be affixed by its duly authorized officers, this 19th day of June, 1911.

AMERICAN SURETY COMPANY OF
NEW YORK,

By F. L. HEMMING,
Resident Vice-President.

[Seal]

Attest: W. M. WALKER,
Resident Assistant Sec.

State of California,
County of Los Angeles,—ss.

On this 19th day of June, 1911, before me, Grace E. Newcomb, a Notary Public in and for Los Angeles County, State of California, duly commissioned and sworn, personally appeared F. L. Hemming and W. M. Walker, personally known to me to be the Resident Vice-President and Resident Assistant Secretary, respectively, of the American Surety Company of New York, the corporation described in and which executed the foregoing instrument, and they acknowledged to me that they executed the foregoing instrument on behalf of the said American Surety Company of New York, as its officers thereunto duly authorized.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this

certificate first above written.

GRACE E. NEWCOMB, [Seal]

Notary Public in and for Los Angeles County, State
of California.

My commission expires September 16, 1914.

[159]

EXTRACT FROM THE RECORD BOOK OF
THE BOARD OF TRUSTEES OF THE
AMERICAN SURETY COMPANY
OF NEW YORK.

The first quarterly meeting of the Board of Trustees of the AMERICAN SURETY COMPANY OF NEW YORK, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Wednesday, January 18, 1911, at 12 o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the

AMERICAN SURETY COMPANY OF NEW
YORK:

"Gentlemen:

"The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 13, 1910, for the purpose of nominating officers of the Company, * * * for the ensuing year, beg leave to report as follows:

“We nominate for * * *

Place.	Resident Vice-Presidents.	Resident Assistant Secretaries.
Los Angeles, Cal.	Wm. J. Washburn	Wm. J. Williams
	R. G. Lunt	Norman Williams
	<i>F. L. Hemming</i>	Chas. L. Chandler
	R. D. Weldon	<i>W. M. Walker</i>
	S. F. Zombro	F. L. Hemming
	W. W. Woods	R. D. Weldon.

* * * * *

“WHEREUPON, it was

“RESOLVED, that the Secretary be authorized to cast one [160] ballot on behalf of the Trustees present for the officers, members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, and Counsel, as recommended by the Nominating Committee for the ensuring year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuring year.

* * * * *

“The following resolution was adopted:

“RESOLVED, that the Resident Vice-Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary.”

* * * * *

State of New York,
County of New York,—ss.

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; [161] and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 19th day of January, 1911.

F. J. PARRY,
Assistant Secretary. [162]

AMERICAN SURETY COMPANY
OF NEW YORK.

CAPITAL AND SURPLUS, \$6,000,000.
(CUT)

COMPANY'S OFFICE BUILDING,
100 Broadway, New York.

GENERAL CERTIFICATE.

The AMERICAN SURETY COMPANY OF NEW YORK, surety on the foregoing bond, hereby certifies that it has heretofore filed in the proper office of the Department of Justice at Washington,
(Insert correct name of Department)

D. C., the following papers:

1. Evidence that it has obtained authority from the Treasury Department of the United States under the Act of Congress approved August 13, 1894, as amended by the Act of Congress approved March 23, 1910, to act as sole surety on bonds in matters affecting the United States.

2. Evidence of the election of general officers of the Company for the current year, with their names.

3. Evidence of the *appoint* of an agent for service of process in the ——— Judicial District of California, Ninth Judicial Circuit.

4. Evidence of the authority of the within-named
F. L. Hemming of Los Angeles, Cal., and
W. M. Walker of Los Angeles, Cal.,
to execute bonds of the character of that annexed hereto on behalf of the Company.

IN WITNESS WHEREOF, the said AMERICAN SURETY COMPANY OF NEW YORK has

caused its seal to be hereto affixed and these presents to be executed by its proper officers at Los Angeles, Cal., [163] this 19th day of June, 1911.

AMERICAN SURETY COMPANY OF
NEW YORK,

By F. L. HEMMING,
Resident Vice-President.

[Seal] Attest: W. M. WALKER,
Resident Assistant Secretary.

The below-mentioned Executive Departments of the United States Government have authorized the filing with bonds executed by Surety Companies of a general certificate on the within form, in lieu of the various papers described therein, viz.:

WAR DEPARTMENT: By letter of the Judge Advocate-General, dated December 27, 1905.

DEPARTMENT OF JUSTICE: By letter of Attorney-General (S. B. S.), dated December 23, 1905.

POSTOFFICE DEPARTMENT: By letter of the Postmaster-General, dated January 16, 1906. (Not necessary to attach any certificate to Letter Carriers' Bonds.)

NAVY DEPARTMENT: By letter of Judge Advocate-General, dated October 19, 1905, transmitting memorandum of the Acting Secretary of the Navy, dated October 18, 1905. (2300-I.)

INTERIOR DEPARTMENT: By letter of the Secretary of the Interior, dated April 26, 1905. (P. M. Div. 1189-05-1988.)

DEPARTMENT OF AGRICULTURE: By letter

190 *J. I. Lamprecht and F. M. Aiken, Trustees,*
of the Secretary of Agriculture, dated December
26, 1905.

DEPARTMENT OF COMMERCE AND LABOR:

By letter of the Secretary of Commerce and
Labor, dated December 6, 1905.

DEPARTMENT OF STATE: Under rulings con-
tained in two letters, dated February 28, 1906,
from the Assistant Secretary of State, it is not
necessary to attach to bonds to be filed in that
Department either a general certificate on this
form or the other papers referred to therein.

TREASURY DEPARTMENT: Under Department
Circular No. 69, Division of Appointments, of
November 21, 1907, and subsequent rulings,
there SHOULD NOT be attached to bonds, to
be approved or filed in that Department, any
of the below-described papers: [164]

General Certificate.

Affidavit of Justification, executed by Officers or
Agents of Surety Companies.

Certificate of Authority from Attorney General
or Secretary of the Treasury to do business
in the United States, under the Act of Con-
gress of August 13, 1894, as amended March 23,
1910.

Certificate of the election of the General Officers
of the Company.

Power of Attorney of Officer or Agent author-
ized to execute the bond. (This includes cer-
tificates of the election of resident officers by
this Company.)

Quarterly Financial Statements.

The Home Office may be relied upon to file such of these papers as may be required by the Department.

ISTHMIAN CANAL COMMISSION: Do not attach a General Certificate, or any papers referred to therein, to bonds to be filed with this Commission.

In preparing a general certificate on the within form, be careful to insert the correct name of the proper Department in the blank that has been left for that purpose. Do not refer to Divisions, Bureaus, etc.

[Endorsed]: No. 192. U. S. Circuit Court, Ninth Circuit, Southern District of California, Northern Division. Edmund Burke vs. Southern Pacific Railroad Company et al. Bond on Appeal. Approved. Wm. W. Morrow, U. S. Circuit Judge. Filed Jun. 21, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [165]

[Order Allowing Appeal.]

In the Circuit Court of the United States for the Southern District of California, Northern Division.

IN EQUITY—No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC R. R. Co. et al.,

Defendants,

and

192 *J. I. Lamprecht and F. M. Aiken, Trustees,*
J. I. LAMPRECHT and F. M. AIKEN, Trustees,
Cross-Complainants,
vs.

SOUTHERN PACIFIC R. R. Co., THE KERN
TRADING & OIL CO. et al.,
Cross-Defendants.

On this 30 day of June, 1911, came the cross-complainants in the above-entitled cause, by their counsel, and presented their petition for an appeal and an Assignment of Errors accompanying the same, which petition upon consideration of the Court is hereby allowed and the Court allows the appeal of said cross-complainants from the order and decree entered in said cause to the United States Circuit Court of Appeals for the Ninth Circuit upon the furnishing of a bond, as provided by law, in the sum of Five Hundred (\$500.00) Dollars.

WM. W. MORROW,
Judge of ———.

Dated: June 30, 1911. [166]

[Endorsed]: No. 192. In the Circuit Court of the United States for the Southern District of California, Northern Division. In Equity. Edmund Burke, Complainant, vs. Southern Pacific R. R. Co. et al., Defendants, and J. I. Lamprecht and F. M. Aiken, Trustees, Cross-complainants, vs. Southern Pacific R. R. Co., The Kern Trading & Oil Co. et al., Cross-defendants. Order Allowing Appeal. Filed Jul. 5, 1911. Wm. Van Dyke, Clerk. By Harry H. Jones, Deputy Clerk. Blandin, Rice & Ginn, and D. J. Hinkley, #1008 Wright & Callender Building,

Los Angeles, California, Solicitors for Cross-complainants. [167]

[Praeceptum for Transcript.]

*In the Circuit Court of the United States for the
Southern District of California, Northern Division.*

IN EQUITY—No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC R. R. CO. et al.,

Defendants.

and

J. I. LAMPRECHT and F. M. AIKEN, Trustees,

Cross-Complainants,

vs.

SOUTHERN PACIFIC R. R. CO., THE KERN

TRADING & OIL CO. et al.,

Cross-Defendants.

To the clerk of said court:

Please prepare the transcripts on Appeal by said cross-complainants, consisting of the following papers and pleadings:

1. Stipulation as to filing amended bill of complaint, filed October 27, 1910.
2. Amended Bill of Complaint, filed October 31, 1910.
3. (Amended) Cross-bill of Complaint of J. I. Lamprecht et al., filed October 31, 1910.

194 *J. I. Lamprecht and F. M. Aiken, Trustees,*

4. Answer of J. I. Lamprecht et al. to Amended Bill, filed November 1, 1910.
5. Stipulation for filing Amended Bill of Complaint and that Demurrer of defendants, Southern Pacific R. R. Co. et al., stand as Demurrer to Amended Bill, filed November 2, 1910.
6. Demurrer of T. S. Minot to Cross-bill of J. I. Lamprecht et al., filed November 10, 1910.

[168]

7. Joint and several Demurrer of Southern Pacific R. R. Co. and The Kern Trading & Oil Co. to Cross-bill of J. I. Lamprecht et al., filed November 11, 1910.
8. Appearance of J. I. Lamprecht and F. M. Aiken, Trustees, by D. J. Hinkley, filed December 27, 1910.
9. Stipulation granting leave to Lamprecht et al. to file an Amended Cross-bill, and that Demurrer to original Cross-bill may stand as Demurrer to Amended Cross-bill, filed January 9, 1911.
10. Cross-bill of J. I. Lamprecht and F. M. Aiken, Trustees, filed January 10, 1911.
11. Stipulation for Amendment of the record filed April ———, 1911.
12. Order amending the record filed April ———, 1911.
13. Cross-complainants' Petition for Appeal, filed ———, 1911.
14. Cross-complainants' Assignment of Errors, filed ———, 1911.

15. Order Allowing Cross-complainants' Appeal, filed ———, 1911.
16. Cross-complainants' Bond, filed ———, 1911.
17. Citation on Appeal, filed ———, 1911.
18. Opinion of Court in *Geo. D. Roberts et al. vs. Southern Pacific Railroad Co. et al.*
19. Opinion of Court in this case.
20. Final decree in this case.

Please advise me of the amount of money necessary to be deposited for the preparation of this transcript.

D. J. HINKLEY,

Solicitor for Cross-complainants, #1008 Wright & Callender Building, Los Angeles, California.

Dated: June 24, 1911. [169]

[Endorsed]: No. 192. In the Circuit Court of the United States for the Southern District of California, Northern Division. In Equity. Edmund Burke, Complainant, vs. Southern Pacific R. R. Co. et al., Defendants, and J. I. Lamprecht and F. M. Aiken, Trustees, Cross-complainants, vs. Southern Pacific R. R. Co., The Kern Trading & Oil Co. et al., Cross-defendants, *Precipe* for Transcript. Filed Jun. 24, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Blandin, Rice & Ginn, and D. J. Hinkley, #1008 Wright & Callender Building, Los Angeles, California, Solicitors for Cross-complainants. [170]

[Certificate of Clerk to Transcript of Record.]

*In the Circuit Court of the United States of America,
of the Ninth Judicial Circuit, in and for the
Southern District of California, Northern
Division.*

No. 192.

EDMUND BURKE,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY
et al.,

Defendants,

and

JOHN I. LAMPRECHT and F. M. AIKEN,
Trustees,

Cross-Complainants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,
a Corporation, THE KERN TRADING &
OIL COMPANY (a Corporation), and T. S.
MINOT et al.,

Cross-Defendants.

I, Wm. M. Van Dyke, Clerk of the Circuit Court
of the United States of America, of the Ninth Judi-
cial Circuit, in and for the Southern District of Cali-
fornia, do hereby certify the foregoing one hundred
and seventy (170) typewritten pages, numbered
from 1 to 170 inclusive, and comprised in one volume,
to be a full, true and correct copy of the pleadings,

and of all papers and proceedings upon which the final decree was made and entered in said cause, and also of the opinion of the Court, the petition for appeal, assignment of errors, order allowing appeal and bond on appeal in the above and therein entitled cause, and that the same together constitute the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in said cause.

I do further certify that the cost of the foregoing record [171] \$148.15, the amount whereof has been paid me by John I. Lamprecht and F. M. Aiken, Trustees, the appellants in said cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Northern Division, this 24th day of August, in the year of our Lord one thousand nine hundred and eleven, and of our Independence, the one hundred and thirty-sixth.

[Seal]

WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California. [172]

198 *J. I. Lamprecht and F. M. Aiken, Trustees,*

[Endorsed]: No. 2028. United States Circuit Court of Appeals for the Ninth Circuit. *J. I. Lamprecht and F. M. Aiken, Trustees, Appellants, vs. The Southern Pacific Railroad Company (a Corporation), The Kern Trading & Oil Company (a Corporation), and T. S. Minot, Appellees.* Transcript of Record. Upon Appeal from the United States Circuit Court for the Southern District of California, Northern Division.

Filed August 28, 1911.

FRANK D. MONCKTON,

Clerk.

By Meredith Sawyer,

Deputy Clerk.

[Order Extending Time to August 30, 1911, to
Docket Cause and File Record.]

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

J. I. LAMPRECHT and F. M. AIKEN, Trustees,
Appellants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY,
THE KERN TRADING & OIL COMPANY
et al.,

Appellees.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellants to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of

Appeals for the Ninth Circuit, at San Francisco, California, be, and the same hereby is, enlarged and extended to and including the 30 day of August, 1911.

Los Angeles, California, July 24, 1911.

WM. W. MORROW,

Judge.

[Endorsed]: No. 2028. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 29, 1911. F. D. Monckton, Clerk. Refiled Aug. 28, 1911. F. D. Monckton, Clerk.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

J. I. Lamprecht and F. M. Aiken,
Trustees,

Appellants,

vs.

Southern Pacific Railroad Com-
pany, Kern Trading and Oil
Company, and T. S. Minot,

Appellees.

BRIEF FOR APPELLANTS.

E. J. BLANDIN and
D. J. HINKLEY,

Wright & Callender Bldg., 4th and Hill Streets,
Los Angeles, Cal.,

Solicitors for Appellants.

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United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

J. I. Lamprecht and F. M. Aiken,
Trustees,

Appellants,

vs.

Southern Pacific Railroad Com-
pany, Kern Trading and Oil
Company, and T. S. Minot,

Appellees.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This cause is brought into this court on appeal from a decree entered in the Circuit Court for the Southern District of California, Northern Division, sustaining the demurrer of the appellees to the cross bill of complaint of the appellants and dismissing the bill.

The Southern Pacific Railroad Company and the Kern Trading and Oil Company are corporations organizing and existing pursuant to the laws of the state of California. [R. 110-111.]

The cross bill was filed for the purpose of having cross complainants' title quieted, and the facts alleged in the cross bill and admitted by the demurrer are, briefly stated, as follows:

By an Act of Congress approved July 27, 1866, the United States made a grant of land to the Atlantic and Pacific Railroad Company for the purpose of aiding in the construction of its road, and by the 18th section of the same act made a similar grant of lands to the Southern Pacific Railroad Company subject to all the conditions and limitations provided in the grant to the Atlantic and Pacific Railroad Company. [R. 114.]

The 3rd section of the act which specifies the term and conditions of both these grants reads as follows:

“And be it further enacted, that there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold,

reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act; provided further, that the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act; provided further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road, *and within twenty miles thereof* may be selected as above provided;

"And provided further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal; and provided further, that no money shall be drawn from the treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.'" [R. 112.]

The fourth section of said Act of Congress, which provides for the issuance of patents under the grants, reads as follows:

"Sec. 4. And be it further enacted, that whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United

States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid." [R. 115.]

Section six of the act provides for a survey designed and intended to fix the primary and lieu limits of the grant and to designate by odd numbers the sections granted, and reads as follows:

"And be it further enacted, that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled, 'An Act to secure homesteads to actual settlers on the public domain,' approved May

twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company." [R. 116.]

Thereafter Congress passed a joint resolution approved June 28, 1870, which reads as follows:

"Be it resolved, etc., that the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the president, as provided in the act making a grant of land to said company, approved July twenty-seven, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seven, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act." [R. 117.]

Prior to the 9th day of May, 1892, certain citizens of the United States qualified by law to make valid locations of mining claims upon the public domain, located as

placer mining ground the lands in controversy in this suit, which are described as follows:

“All of section 11, 13, 23 and 33, township 19 south, range 15 east, Mount Diablo base and meridian, and all of section 5, township 20 south, range 15 east, Mount Diablo base and meridian, all situated in Fresno county, California.” [R. 111.]

and performed thereon all acts necessary to make placer mining locations covering all of said lands, provided said lands were then public and open to locations under mineral laws. Said lands were known to be mineral lands ever since 1865, of which the Southern Pacific Railroad Company and the Kern Trading and Oil Company at all times had notice, and that the latter company was organized for the purpose of developing said lands and other mineral lands which the Southern Pacific Railroad Company claimed under said grant. [R. 118.]

Prior to the 9th day of May, 1892, Coalinga Mining District was organized and all of the locations made as aforesaid were recorded prior to the 9th day of May, 1892, in the office of the recorder of said mining district, which was the proper place for recording them under the rules, regulations, customs and usages of the miners of that district, and that all of the lands in controversy in this suit were included in the boundaries of that mining district. [R. 118.]

There has never been any law, state or federal, in force in said mining district requiring location notices to be recorded either in the local land office at Visalia, in which district said lands are located, or in the General Land Office at Washington prior to the time application was made for patents of mining claims. [R. 119.]

On the 9th day of May, 1892, the Southern Pacific Railroad Company, by its duly authorized land agent, made an *ex parte* application for patent of about 440,900 acres of land claimed by the railroad company under its grant, including the lands involved in this suit, and said application states that the land so applied for enured to the company for the construction of its road for a continuous distance of 40 miles and 559/1000 of a mile, ending at Alcalde, California. [R. 120-122.] The railroad was not completed beyond Alcalde, and the portion thereof last above mentioned was the last road completed by the company under its grant, and the grant of all lands opposite and coterminous to the uncompleted portion of the road was forfeited by Act of Congress approved the 29th day of September, 1890. The railroad did not at the time of making its application or afterwards request that the mineral or non-mineral character of any of the lands for which it applied be determined before issuance of the patent. [R. 122.] On the 14th day of May, 1892, the registrar and receiver of the local land office at Visalia certified that they had examined the list of lands for which patent was sought and tested the accuracy thereof by the plats and records of their office, and that they found same to be correct; that the filing of said list of lands was allowed and approved and that the whole of said lands were public lands of the United States within the limits of twenty miles on each side of the line of said road and that the same were not nor were any part thereof returned and denominated as mineral lands nor claimed as swamp lands, and that there was not any homestead, pre-emption, state or other valid

claim to any portion of said lands *on file or on record in said local land office.* [R. 122.]

Prior to the 27th day of June, 1894, the officers of the General Land Office examined said list of lands in connection with the records and plats of the General Land Office and found that the lands described in said list fell within the twenty mile lateral limits of said road, and that they were, so far as the records of the General Land Office showed, “free from conflict,” but the officers of the Interior Department had not had, for the examination of said lands, sufficient opportunity to determine whether any of them were or were not mineral lands or to justify a statement by them in a patent of the United States that they were non-mineral. Neither the officers of the local land office at Visalia nor the officers of the General Land Office or the Interior Department ever found or determined that all of said lands were non-mineral, or decided or attempted to decide whether they were or were not mineral lands. [R. 123.] Under these circumstances the Commissioners of the General Land Office, in conformity with the rulings and decisions of the Interior Department which were then in full force and effect, and which had been followed by the officers of that department in such cases for 40 years, recommended to the then Secretary of the Interior as follows, to-wit:

“It is hereby recommended that the tracts described” (in said list) “covering 440,900.85 acres, be approved and carried into patent as the lands falling within the grant by the act as aforesaid to the said Southern Pacific Railroad Company of California, excluding, however, from the approval and from the transfer in the patent that may be issued ‘all mineral lands’ should any such be found in the tracts aforesaid; but this exclusion, accord-

ing to the terms of the statute, shall not be construed to include coal and iron. [R. 124.]

G. W. LAMOREAUX,
Commissioner.”

And the then Secretary of the Interior approved said recommendation as follows:

“Approved; covering 440,900.85.

HOKE SMITH, *Secretary.*”

[R. 124.]

There was no other or further finding, determination, recommendation or certification by any officer of the Interior Department prior to the issuance of the patent as to the mineral or non-mineral character of any of said lands, all of which were included in the patent herein-after mentioned. [R. 124.]

On the 10th day of July, 1894, in pursuance of said recommendation and its approval, the officers of the Interior Department charged by law with the duty of preparing and issuing patents under said grant, executed and thereafter delivered to the Southern Pacific Railroad Company the patent pleaded in this cause, which includes in its description the lands here in controversy. [R. 125, 135.] The patent recites the existence of said act and joint resolution and the grant thereby made; that by them “provision is made for granting to said company ‘every alternate section of public land designated by odd numbers *to the amount of twenty alternate sections per mile* on each side of said railroad on the line thereof, and within the limits of twenty miles on each side of said road’ ‘not sold, reserved, or otherwise disposed of by the United States, and to which pre-emption or homestead

claim may never have attached at the time the line of said road is definitely fixed' ”; that it appeared from the records of the land office that the road from San Jose to Tres Pinos and from Alcalde to Mojave, together comprising 252 miles and 479/1000 of a mile, had been constructed as required by law and accepted by the president; that the lands applied for had been listed under the act by the duly authorized land agent of the Southern Pacific Railroad Company; that said tracts of land (describing them) lie *coterminous to the constructed line of said road*. The granting clause of the patent reads as follows [R. 135]:

“Now, know ye, that the United States of America, in consideration of the premises and pursuant to the said Acts of Congress, have given and granted and by these presents do give and grant unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing. Yet excluding and excepting ‘all mineral lands,’ should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall be construed to include ‘coal and iron lands.’ ” [R. 125.]

No notice, constructive or actual, was given to any of the prior mineral locators of said lands of said *ex parte* application for patent, nor was there any publication of the application, nor was there any hearing ordered or had in the local land office or the General Land office or anywhere else for the purpose of allowing any person having an interest in, or claim upon any of said lands to be heard in the defense of their rights to or claim upon said lands [R. 126], and said prior mining locations were never cancelled. [R. 127.] The Southern Pacific Rail-

road Company accepted said patent without protest and caused the same to be recorded as evidence of its title [R. 127]; none of the lands in controversy in this suit are within the limits of twenty miles of any completed section of twenty-five consecutive miles of the railroad as required by the fourth section of the act and by said joint resolution and are not coterminous with any completed section of twenty-five consecutive miles of the line of said road, but that all the lands here in controversy lie opposite and coterminous to an uncompleted section of twenty-five consecutive miles of said railroad line. Prior to the certification of said list of lands and the issuance of the patent, the railroad company had received from the United States for the construction of its railroad land to the amount of more than ten alternate odd numbered sections per mile for all the railroad it has ever constructed under this grant. [R. 128.]

On the third day of March, 1909, certain citizens of the United States qualified by law to locate and acquire title to public mineral lands under the mineral laws of the United States, entered upon the lands in controversy in this suit, and relocated them as placer mining ground and performed thereon all the acts necessary to establish valid mining locations upon said lands covering all of the same, provided said lands were then public lands, which cross-complainants allege they were, and caused their location notices to be duly recorded as required by law. [R. 129.] Neither the Southern Pacific Railroad Company or the Kern Trading and Oil Company had ever, prior to the beginning of this suit, been in actual, open, notorious, exclusive, continuous or hostile posses-

sion, or any possession whatsoever, of any of the lands here in controversy in this suit [R. 130]; these lands are worth upwards of \$60,000 and that the cross-complainants have acquired an undivided 9/10 interest in all the mining claims last above mentioned, which is worth upwards of \$50,000. [R. 131.]

Upon this state of facts the cross-complainants pray the cloud cast upon their title by said patent be removed and that their title may be quieted to said lands, and that the court decree that neither the Southern Pacific Railroad Company nor the Kern Trading and Oil Company, nor the cross-defendant, T. S. Minot, who claims to have some right, title or interest in the property, have any right, title or interest in or to said lands or any part thereof. The defendants, Southern Pacific Railroad Company and Kern Trading and Oil Company demurred to the cross bill upon the following grounds:

That the cross bill does not state a cause of suit and that its allegations do not entitle cross-complainants to any relief or discovery, and set up as a special defense the first section of the action of Congress approved March 2, 1896, entitled "An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes" (29 Stat. at large, 42), and especially claimed that this suit is barred by the following sections of the Code of Civil Procedure of the state of California, section 318, which reads as follows:

"No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his

ancestor, predecessor, or grantor, was seized or possessed of the property in question within five years before the commencement of this action."

Section 319:

"No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made."

Section 320:

"No entry upon real estate is deemed sufficient or valid as a claim unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended or accrued."

Section 321:

"In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for five years before the commencement of the action."

Section 338:

"Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture;
2. An action for trespass upon real property;
3. An action for taking, detaining, or injuring

any goods or chattels, including actions for the specific recovery of personal property;

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Section 343:

"An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Also, that this suit is barred by laches.

The cross-defendant, T. S. Minot, appearing *In Pro. Per.*, demurred on the following grounds generally that the cross-complaint does state a cause of action against him; that there was a misjoinder of parties; that the bill shows no right, title, or interest of the cross-complainants which can be enforced against him in this suit. That the cross bill is uncertain and duplicitous and does not show the nature of the suit or its purpose. That the cross bill shows a non-joinder in that it does not show why cross-complainants did not join as plaintiffs in the original bill. That the cross bill seeks no discovery and sets up no defense which might not be taken by answer. That the cross-complainants have no authority from the United States to institute or maintain the suit. That the cross bill does not sufficiently specify fraud. That the cross bill is ambiguous, repugnant and paradoxical and is not intelligent. That it does not state the nature of the trust, that it is multifarious, that it does not give the addresses of the cross-complainants and does not show privity of entering between the cross-complainants and cross-defendant, T. S. Minot.

That the cross bill is defective in that its several paragraphs state only conclusions of law.

The questions of law argued and submitted in the court below were:

1. Whether the Interior Department had authority in law, before cancelling the prior mining locations on the land, to pass to the railroad company title to the land freed from the right of citizens to acquire title to the land by location under and in compliance with the mining laws.

2. Whether the patent issued is effective to keep the title of defendants limited to lands non-mineral in fact.

3. Was the grant of lands to the amount of ten alternate sections per mile of road as stated in the act, or to the amount of twenty alternate sections per mile of road as stated in the patent?

4. Did the fact that the land in controversy lie opposite to and coterminous with an uncompleted section of twenty-five consecutive miles of the road deprive the Interior Department of jurisdiction to issue patent to the railroad company for the land before the twenty-five mile section opposite and coterminous to it was completed after the forfeiture act approved September 29, 1890.

5. If the patent was void or voidable when issued, has it been validated and confirmed by acts of Congress so that it is now effective:

(a) According to its terms and import, or

(b) As an absolute convenience of all the lands described in it.

The court below held:

1. That cross-complainants are not in privity with the United States.

2. That there is no authority of law for the insertion in the patent of the clause, "Yet excluding and excepting 'all mineral' lands, should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron lands.' "

3. That the patent issued created a conclusive presumption that the officers of the Interior Department had decided before issuing the patent that all the lands therein described were non-mineral, and that such presumed decision constituted a complete and final adjudication, not open to rebuttal, that the land is non-mineral.

The court below did not pass upon any other questions of law raised by the demurrer and argued.

The demurrer of S. T. Minot was sustained and the cross-complaint dismissed as against him for the reason that the court was of the opinion that no one but the railroad company and the Kern Trading and Oil Company had any title, right or interest in the land or any part thereof.

ARGUMENT.

We will discuss the questions of law submitted in the court below in the order above stated:

I. IT WAS NOT WITHIN THE POWER OF THE INTERIOR DEPARTMENT, BEFORE CANCELLING THE PRIOR MINING LOCATIONS, TO PASS TO THE RAILROAD COMPANY TITLE TO THE LAND FREED FROM THE RIGHT OF CITIZENS TO ACQUIRE TITLE TO IT BY LOCATION UNDER AND IN COMPLIANCE WITH THE MINING LAWS.

It cannot be denied that:

1. A valid mining location upon public mineral lands vests in the locator thereof the right of exclusive possession of the land located, and confers the further right to acquire title in fee of the land located by compliance with the provisions of the mineral laws.

2. Mining claims are universally recognized as interests in real property and pass by deed and inheritance as such.

3. The mining laws operate through the locations of the claims as a grant of these rights to and interests in the lands located to the locator.

4. That said rights and interests are property, in the fullest sense of the term.

Belk v. Meagher, 104 U. S. 279, 284;

Gwillim v. Donnellan, 115 U. S. 45, 49;

Noyes v. Mantell, 127 U. S. 348;

Clipper Mining Co. v. Eli Mining Co., 194 U. S. 220, 226;

Forbs v. Gracy, 94 U. S. 262, 267;

Mannel v. Wulff, 125 U. S. 505, 510;

Black v. Elkhorn Mining Co., 163 U. S. 445.

It was held in *Barden v. Northern Pacific*, 154 U. S. 288, that locations, under the mining laws of the lands, which are in fact mineral and in odd sections within the limits of a railroad grant, are effective to exclude the land so located from the grant, if the location be made at any time before the patent issued, upon an adjudication by the Interior Department that the land located is non-mineral. The cross bill alleges and the demurrer admits that the lands here in controversy were and are mineral in fact and that they were located as above specified. They were therefore excluded from the grant by such locations which were of record as required by law, and were in full force and effect at the time the patent issued.

The grant was made by the statute and not by the patent, which is only evidence of title.

Desert Salt Co. v. Tarpey, 142 U. S. 240;

Wisconsin Central v. Price Co., 133 U. S. 406.

There is nothing in the patent in the nature of a warranty of title or ownership of the land by the United States and therefore any interest in or right to acquire an interest in it as mineral land, outstanding at the time the patent issued was not passed by the patent, which could *grant* nothing. If the rights enuring to the mineral locators under their locations were subsequently forfeited to the United States, they could not by either the patent or the statute pass to the railroad company because both the statute and the patent in terms exclude all mineral lands from the conveyance.

If it be true, as held in the *Barden* case, that the effect of the location of a valid mining claim upon the land before patent issued upon an adjudication that the

land was non-mineral excepted the land so located from the operations of the statute which made the grant, it is difficult to perceive how the patent, which was not intended to grant anything, and which does not purport to grant or otherwise pass title to mineral lands, has the effect of granting or passing title of such lands or bringing them under the operations of the statute, especially when it in terms states that it does not do so.

All public offices and all tribunals are limited in point of power and the nature and character of the final acts and judgments by the law under which they assume to act, and if such act or judgment transcends the power conferred by law, it is a nullity.

Bigelow v. Forrest, 9 Wallace 339;

Windsor v. McVeigh, 93 U. S. 274;

Ex parte Lang, 85 U. S. 163;

United States v. Walker, 109 U. S. 258.

The only means by which the railroad could acquire title to these mineral lands under the grant would be by a decision of the proper officers that the lands were non-mineral and the issuance of a patent upon such decision; such decision and patent would render the lands non-mineral within the meaning of the statute and pass title to them.

Barden v. N. P. R. R., supra.

The patent issued is effective to keep all lands which are mineral in fact excluded from the grant.

The granting act is a special statutory law, complete in itself, designed and intended exclusively to apply to and control the transactions for which it provides; its

operations and effect are not subject to any rules of common law, applicable to private conveyances, or controlled or determined by the provisions of general statutes, which are not in terms applicable to the particular transactions for which the special statute provides.

Congress has full power, in granting public lands by special statute, to grant such estates therein upon such conditions as it deems advisable. To assert otherwise would be to deny the legislative authority vested in Congress by the Constitution. That its conveyance does not conform to the rules of common law or to the provisions of other statutes is of no consequence. The granting statute is itself the law which exclusively controls the title and, in case of conflict, supersedes both the rules of common law and the provisions of general statutes which control other conveyances of public lands made by patent.

This grant is by an elaborate special statute, which shows clearly the intention of Congress that other laws should not determine its operations. This is peculiarly true of all railroad grant land statutes, because in them are found provisions to govern all the details of the transactions contemplated by them. The granting statute under consideration is the most definite, complete and elaborate railroad land grant statute passed by Congress, and under the rules of statutory construction, must be held to preclude the application of other laws to its special subject matter.

General statutes for the conveyance of public lands provide that the officers of the Interior Department shall convey parcels of lands of specified character to individuals having specified qualifications upon satisfac-

tory proof of performance by the applicants of specified duties. In such cases a decision by the officers of the Interior Department that the applicant has the proper qualifications, and has performed the duties which entitle him to the land, and that the land is of the character for which patent is authorized by the statute, is in each instance necessarily pre-requisite to the *grant, which is made by the patent*, and which such general statutes provide shall be unconditional when made.

In such cases there is no authority of law for a conditional grant, and hence none for a conditional patent.

But in the case at bar the grant is *in praesenti* by the statute, and is, *by the statute, which is the law* of the conveyance, made subject to the condition, also *in praesenti*, that the grant does not attach if the land is mineral. Congress had ample authority to make such a grant and it made none other, nor did it authorize the officers of the Interior Department to change the grant which it made, or to make any other or additional grant.

While the appellees do not openly contend that any of these general statutes have superseded this special granting act, yet they do so in effect, by citing cases defining the effect of patents issued under such general statutes, and contending that because such patents create a presumption that the land described in them is of the character authorized by such *general statutes* to be conveyed by such patents—that therefore, in this case, the patent which contains a clause excepting mineral lands, and which was issued after the grant, from which mineral lands are excluded, was made by the special statute—that such patent creates a presumption that the lands described in it are non-mineral.

This is an ingenious method of applying the provisions of general statutes in this case in order to secure title, under this special granting statute, to lands which the special statute forbids to pass by or under it.

That appellee's title must be established, if at all, by the provisions of this special granting statute, and not by the provisions of any other law is too clear to require argument, but as, in the court below, they assumed otherwise and prevailed; we will note here the extent to which special statutes and special exceptions in statutes are held to survive, as against general statutes and general provisions therein. This principle of law is best exemplified in those cases where the question was whether a special statute had been superseded by a later general statute dealing with the same subject.

In *Rogers v. United States*, 185 U. S. 83, 87, the court says:

"It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not effect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly made, or unless the provisions of the general are manifestly inconsistent with those of the special. In *Ex parte Crow Dog*, 109 U. S. 556, 570, this court says:

"The language of the exception is special and express; the words relied on as a repeal and general and inclusive. The rule is *generalia specialibus non derogant*. "The general principle to be

applied," said Bovill, C. J., in *Thorpe v. Adams*, (L. R. 6 C. P. 135), "to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together."

"And the reason is," said Wood, V. C., in *Fitzgerald v. Champenys*, (30 L. J. N. S. Eq. 782; 2 Johns. & Hem. 31, 54), "that the legislature having its attention directed to a special subject and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do."

"In Black on Interpretation of Laws, 116, the proposition is thus stated:

"As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.'

"So, in Sedwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule:

"The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.'

“And in *Crane v. Reeder*, 22 Michigan, 322, 334, Mr. Justice Christiancy, speaking for the Supreme Court of that state, said:

“ ‘Where there are two acts or provisions, one of which is special and particular and certainly includes the matter in question, and the other general, which, if standing alone would include the same matter and thus conflict with the special act or provision the special must be taken as intended to constitute an exception to the general act or provision especially when such general and special acts or provisions are contemporaneous as the legislature is not presumed to have intended a conflict.’

“Both the text books and the opinion just quoted cite many supporting authorities.”

This principle of law confines us to this special granting statute and its operations and to cases arising under it and similar railroad land grant statutes in determining whether the title to the land in controversy ever passed the grant.

THE STATUTORY GRANT, BEING *in praesenti*, PASSED THE TITLE GRANTED AS OF ITS DATE, OF ALL LANDS WHICH WERE, AT THE DATE OF THE FILING OF THE MAP OF DEFINITE LOCATION, OF THE DESCRIPTION AND CHARACTER SPECIFIED IN THE STATUTE AS GRANTED.

In *St. Paul & Pacific v. Northern Pacific*, 139 U. S. 1, 5 (1890), the court, discussing this proposition, says:

“This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion.”

To the same effect are:

1874: Schunenberg v. Harriman, 21 Wall. 44,
60 Leavenworth Lawrence &c. Railroad Co.,
97 U. S. 491;
Railroad Co. v. Baldwin, 103 U. S. 426.

See also:

Southern Pacific Railroad Company v. United
States, 183 U. S.

THE TITLE GRANTED IS ABSOLUTE, PROVIDED THE LANDS ARE NON-MINERAL WITHIN THE MEANING OF THE STATUTE, BUT IT IS NOT ABSOLUTE UNLESS AND UNTIL THE LANDS ARE NON-MINERAL WITHIN THE MEANING OF THE STATUTE.

The language of the statute is so clear and specific upon this proposition that citation of authorities would seem unnecessary, if defendants did not claim that this grant, made *in praesenti* by statute, containing an exception *in praesenti*, of all mineral lands, known or unknown, from its operations, operated to pass to them, as the date of the grant, the lands in controversy which they admit to be mineral, because an executive officer issued a patent, stating therein in effect that it passed title to no mineral lands, which should be found in the tracts described therein. To show that the statute, before the patent issued, did not pass title to mineral lands, we quote from Barden v. Northern Pacific, 154 U. S. 288, 316.

“It seems to us as plain as language can make it that the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time

known to be mineral. After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and among other things that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not reserved, sold, granted, or otherwise appropriated, and were free from preemption and other claims or rights at the time the line of the road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that, in lieu thereof, a like quantity of unoccupied and unappropriated, agricultural lands, in odd sections, nearest to the line of the road, might be selected.

“There is, in our judgment, a fundamental mistake made by the plaintiff in the consideration of the grant. Mineral lands were not conveyed but by the grant itself and the subsequent resolution of Congress cited were specifically reserved to the United States and excepted from the operations of the grant. Therefore, they were not to be located at all, and if in fact located they could not pass under the grant. Mineral lands being absolutely reserved from the inception of the grant, Congress further provided that *at the time of the location* of the road other lands should be excepted, viz: those previously sold, reserved, or to which a homestead or preemption right had attached.”

This language leaves no room for doubt as to the effect of the statute when considered independently of the patent.

THE PATENT CANNOT CHANGE THE TITLE GRANTED OR ENLARGE OR DIMINISH THE EXTENT OR AMOUNT OF THE GRANT. ITS OFFICE IS TO AFFORD CONVENIENT EVIDENCE OF THE TITLE GRANTED AND TO IDENTIFY THE LANDS OF WHICH THAT TITLE PASSED BY THE STATUTE.

The legal title to all the lands granted by the act passed thereby upon the filing of the map of definite location, and the Supreme Court has uniformly held that the patent provided for in the statute was not intended to and does not grant or convey anything. In *Desert Salt Company v. Tarpey*, 142 U. S. 240, which was a case arising under the Central Pacific Railroad grant (13 Stats. 356), replying to the argument that the provisions in the fourth section for the issuance of the patent qualified the grant, *in praesenti*, of the third section, the court says:

“But it is contended that the natural import of the granting terms of the Act is qualified and restricted by its fourth section, which, as amended by the Act of 1864, provides that, upon the completion of not less than twenty consecutive miles of the road and telegraph line in the manner required, and their acceptance by the President upon the report of the commissioners appointed to examine the work, patents shall be issued to the company conveying the right and title to lands on each side of the road as far as the same is completed.

“The question naturally arises as to the necessity for patents, if the title passed by the Act itself upon the definite location of the road, when the alternate sections granted had become identified. We answer that objection by saying that there are many reasons why the issue of patents would be of great service to the patentees, and by repeating substantially what we said on that subject in *Wisconsin Central Railroad Company v. Price Company*, 133

U. S. 406, 510 (33, 686, 694). While not essential to transfer the legal right the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions. They would serve to identify the land as coterminous with the road completed; they would obviate the necessity of any other evidence of the grantee's right to the lands, and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would thus be in the grantee's hands deeds of a further assurance of his title and, therefore, a source of quiet and peace to him in its possession."

The court used the same language in *St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1. But in *Barden v. Northern Pacific*, *supra*, the Northern Pacific claimed that the language above quoted meant that upon the definite location of the line of the road, the statute passed title to mineral lands in the odd sections which were not known to be mineral, and in reply to that argument the court says:

"The cases cited in support of the claim of the plaintiff only show that the identification of the sections granted and of the exceptions therefrom of parcels of land previously disposed of, leaves the title of the remaining section or parts thereof, to attach as of the date of the grant, but has absolutely no other effect. Such is the purport, and the sole purport, of the cases of *St. Paul and Pacific Railroad Company v. Northern Pacific Company*, 139 U. S. 1, 5, and *Desert Salt Company v. Tarpey*, 142 U. S. 241, 247, cited by the plaintiff. In both of those cases the writer of this opinion had the honor to write the opinions of this court; and it was never asserted or pretended that they decided anything

whatever respecting the minerals, but only that the title to the lands granted took effect, with certain designated exceptions, as of the date of the grant. They never decided anything else. And what was the title? It was of the lands which at the time of the grant were not reserved as minerals, and of the lands which at the time of the location had not been sold, reserved, or to which a preemption or homestead had not attached."

It is evident from these cases that the grant as made by the statute which passed the legal title at the time of the filing of the map of definite location of the road, of all the lands to which the grant ever attached; that it attached to no mineral lands; that the patent was not intended to and does not (under the provisions of this statute) grant or convey any lands, but is simply evidence of the grant made by the statute, and was never intended to be anything else. Such is not, as we have shown, the purpose or effect of a patent issued under a general statute where the patent is itself the grant which under such statute must be unconditional when made.

LANDS ARE NON-MINERAL, WITHIN THE MEANING OF THE STATUTE:

1. IF THEY ARE NON-MINERAL IN FACT.
2. IF THE INTERIOR DEPARTMENT HAS DECIDED THAT THEY ARE NON-MINERAL IN FACT, AND SUCH DECISION IS NOT SHOWN TO BE ERRONEOUS BEFORE THE ISSUANCE OF PATENT REMAINING IN FORCE.

Defendants do not deny subdivision one of this proposition. They admit by their demurrer, that the lands in controversy are mineral in fact. Therefore it must ap-

pear that they are, for some reason, non-mineral within the meaning of the statute, although they are mineral in fact, or title to them never passed under it.

If these mineral lands were at the date of the patent public lands, then an erroneous decision, by the proper officers of the Interior Department, that they were non-mineral and the issuance of the patent provided for in the statute, showing that such decision was made, would, so long as such patent remained in force, establish the character of the land as non-mineral within the meaning of the act, because those officers, acting under the direction of the Secretary of the Interior, constitute a special tribunal having jurisdiction to determine the character of lands granted by Congress and their decisions of questions of fact in such matter are final except in direct proceedings.

The inquiry is then narrowed to this:

Does it appear from the record that the officers of the Interior Department made an erroneous decision before issuing the patent pleaded in this case that all the lands therein described in terms of the records of the land office, were non-mineral?

In answering this question it must be remembered:

1. The condition, *in præsenti* of the grant that the lands must be non-mineral before the grant can attach to them renders a decision by the proper officers that they are such necessarily prerequisite to the attachment of the grant to them; and,

2. The defendants confessedly seek to establish, by virtue of an erroneous decision by public officers, their title to property which Congress intended and declared

that they should not have, and they must therefore show affirmatively from the record that such erroneous decision was made.

A discussion of these two minor propositions leads directly to the consideration which divided the court in the Barden case. When that case came before the court it was irrevocably committed to the following propositions in construction of railroad land grants:

1. That the railroad grants were grants *in praesenti*, and that they passed a present title as of the date of the grant to all the land granted by them, upon the definite location of the line of the road. Such had been the uniform rulings of the Supreme Court in many cases.

2. That a patent issued under the provisions of one of these railroad grants neither granted nor conveyed anything, but was only convenient evidence of the grant made by these special statutes, and that the road opposite the lands had been completed.

The court had also uniformly held that in case of grants made by patents issued under general statutes, the decision by the officers of the Interior Department of all questions of fact necessary to entitle the applicant to the land, was necessarily prerequisite to the making of the grant by the issuance of the patent, and that, therefore, the grant having been made, the patent, which was a perfect record of the grant, precluded any collateral inquiry as to the character of the lands described in it.

The court was confronted with these previous rulings, in considering the exclusion *in praesenti* of all mineral lands from the operations of the granting act, and this

excluding clause of the statute was direct, positive and unqualified. The difficulty was to give effect to this exclusion clause, in accordance with the plain intention of Congress, and not overrule the cases which held that the statute passed a present title, and that the patent in no way changed the grant made by the statute.

The minority of the court sought to reconcile the apparent conflict by conceding that only lands known at the date of the grant to be mineral were excluded therefrom. Their reason for this was that the patent cannot change the grant and that, if lands not known to be mineral, at the time of the grant could be claimed by citizens when they afterwards turned out to be mineral, then the question of the character of the land could never be settled, and the title would always be uncertain.

Mr. Justice Brewer stated tersely, in his dissenting opinion, at page 335 *et seq.*, the difficulty which confronted the court in *Barden v. Northern Pacific*, *supra*, when he said:

“But it is said that Congress never meant that this vast mineral wealth should pass to this corporation, and that the individual must contract with that corporation for the purchase of any mine, and yet with a strange inconsistency, as it seems to me, before the opinion is closed it is declared, *in effect*, that Congress meant that when the President should issue a patent, the mineral wealth, vast as it is supposed to be, should then pass to the corporation. If Congress by its legislation excluded mineral lands from the scope of this grant, then surely no executive officer is authorized to convey mineral lands, and even the patent of the President passes no title thereto. The concession *that the patent conveys the mines* as incident to the conveyance of the land is a concession that the lan-

guage of the grant, excluding from the operation of the grant mineral lands, is not to be taken absolutely; and leaves the only difference between the opinion of the court and my own that of the time as to which the identification of the lands as mineral lands is to be had."

The learned justice then cites and quotes from—

St. Paul & Pacific Railroad v. Northern Pacific Railroad, 139 U. S., 1, 5;

Schulenberg v. Harriman, 20 Wall. 44, 60;

Leavenworth, Lawrence etc Railroad Co. v. United States, 92 U. S. 733;

Missouri, Kansas etc. Railway Co. v. Kansas Pacific Railway, 97 U. S. 491;

Railroad Company v. Baldwin, 103 U. S. 426;

Langdreau v. Hanes, 21 Wall. 521;

Wright v. Roseberry, 121 U. S. 488, 497;

Desert Salt Company v. Tarpey, 142 U. S. 241, 247;

Wisconsin Central R. R. Co. v. Price County, 133 U. S. 496, 507;

—to show that the title of all lands granted passes as of date of the grant upon the filing of the map of definite location of the road, and that the patent does not, and could not, pass title to any lands not granted by the statute, but was intended only as evidence of the grant made by the statute.

No one can read the opinions in those cases and doubt that they establish those two points beyond all question, and the prevailing opinion in the Barden case concedes fully that they do establish them. Therefore, the pivotal question in the Barden case was not *when* "the identification of the lands as mineral lands is to be had", as

stated at the top of page 236 in the dissenting opinion; *but it was what is necessary to fix as non-mineral, within the purview of the granting statute, the character of the lands therein described in terms of the records of the land office*, and thus complete the evidence of absolute title in the grantee. For this we must look to the prevailing opinion in the Barden case where the majority of the court undertook to explain and direct how the title to the odd-numbered sections within the limits of these grants can be forever set at rest, in conformity with the previous rulings of that court. Such explanation and direction were absolutely necessary to refute the arguments set forth in the dissenting opinion, and they constitute the very essence of the reason of the ruling of the court in the Barden case, and it is a misconstruction of the opinion to regard them otherwise.

At page 226 of the prevailing opinion in that case, the court begins consideration of the method provided by law for determination of what odd sections were of the character granted by the statute, and first refers to the argument for plaintiffs that if unknown mineral lands were excluded from the grant, the title would always be uncertain, because mineral might be discovered in them, long after they had passed into the hands of the grantees and improvements of great value made upon them. The opinion concedes that it is—

“of the utmost importance to the prosperity of the country that titles to lands and to mineral in them shall be settled, and not be subject to constant and ever recurring disputes and litigation, to the disturbance of individuals and the annoyance of the public.”

It cannot be reasonably contended that what the court declares in pointing out the method by which a matter "of the utmost importance" is to be determined according to law is *obiter*, especially when the designation of such method is necessary to harmonize the ruling of that court with previous opinions.

After stating that the exclusion of all mineral land from the grant *need not create uncertainty in titles*, the court points out that the officers of the Interior Department can investigate and *determine* the character of the lands, and

"issue to the rightful claimant the patent provided by law specifying that the lands are of a character for which patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. The Act of Congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands, in the direction for such patent to issue, the land office can examine into the character of the lands, and designate it in its conveyance."

Such is the method pointed out by the Supreme Court for settling the titles to lands claimed under these railroad grants, viz.: An examination of the land; a determination that they are non-mineral; *a statement in the patent* that they are non-mineral.

To show that it is within the jurisdiction of the Interior Department to do these things, and that their determination of such questions of fact is final and conclusive in collateral proceedings, the court cites and quotes from *Smelting Company v. Kemp*, 404 U. S.

636, 640, 641; *Steel v. Smelting Company*, 106 U. S. 447, 450; *Heath v. Wallace*, 138 U. S. 573, 585; *Knight v. Land Association*, 142 U. S. 161, 178, and *Central Pacific Railroad Company v. Valentine*, 11 Land Dec. 338, 246; and there can be no question that these cases establish beyond controversy that the Interior Department has jurisdiction to determine such questions of fact, and that their determination of them whether correct or erroneous, is final and conclusive in collateral proceedings.

Having in mind a patent issued in proper form after a determination of the character of the land, and a statement of its character in the patent, the court says that if the officers of the government whose duty it is to prepare and issue the patent issue it unadvisedly, in the absence of fraud, the consequence of the negligence of the officers must be borne by the Government, but it is entirely clear from the opinion that the court was speaking of a patent which, upon its face, stated the character of the land, and the court distinctly says, at the bottom of page 330, that a patent which does not show upon its face by a statement in the patent itself, that the land is non-mineral, does not comply with the Acts of Congress making grants to railroad companies to aid in the construction of their roads. The language of the court is:

“The fact remains that under the law the duty of determining the character of the lands granted by Congress and stating it in instruments transferring the title of the Government to the grantees, reposes in the officers of the Land Department. Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the Act of Congress in which the grant before us was made to plaintiff.”

It would be difficult indeed to assemble words which would state more clearly than the court states in this opinion that it was the intention of Congress to exclude all mineral lands from the conveyance of this statute, and that before any particular parcel of land could pass to the grantee, absolutely, there must be a determination by the proper officers that the land was non-mineral, *and that such determination must be stated in the patent.*

If there is any doubt as to the meaning of the language above quoted, it is dispelled by the language of the dissenting opinion at page 340, where Justice Brewer says:

“Take any particular mile of the road; on either side of the line, as located, there are twenty alternate sections within the place limits. By the rule now laid down, the title to no one of these twenty sections passes to the company because it is not known absolutely which are mineral lands. So far as known, none may be mineral, and yet, as in this case before us, six years after the line of the definite location an expiration develops the fact of minerals, and then it is declared that the titles did not pass. When you simply say, as the court does in this opinion, that out of those twenty sections there shall pass the title to such lands as shall thereafter be found or be determined by the Secretary of the Interior to be non-mineral lands, you say in effect that there is no identification of a single tract. This court has hitherto said that when the line of definite location is fixed, the lands granted were identified. That means, if it means anything that the particular lands which passed by the grant were disclosed. Now it is said that they are not disclosed, and cannot be identified as passing by the grant until it shall be affirmatively proved that they do not contain mines, or the Secretary of the Interior has determined that they are not mineral lands.”

Although this language is taken from the dissenting opinion, it is an accurate statement by a member of the court of what the prevailing opinion holds, and a comparison of it with the language of the prevailing opinion establishes beyond all question that the Supreme Court in the *Barden* case laid down the rule that the condition *in praesenti*, of the statute, that the lands must be non-mineral before the grant can attach to them, *renders a decision by the proper officers that they are such necessarily prerequisite to the attachment of the grant to them.*

It is alleged in the bill and admitted by the demurrer that the land in controversy in this suit is mineral in fact, and this bring us to another proposition.

THE APPELLEES CONFESSEDLY SEEK TO ESTABLISH, BY VIRTUE OF AN ERRONEOUS DECISION BY PUBLIC OFFICERS, THEIR TITLE TO PROPERTY WHICH CONGRESS INTENDED AND SPECIALLY DECLARED BY STATUTE THAT THEY SHOULD NOT HAVE, AND THEY MUST THEREFORE SHOW AFFIRMATIVELY FROM THE RECORD THAT SUCH ERRONEOUS DECISION WAS MADE.

In considering this proposition and the methods by which the making of such erroneous decision might be established, it should be remembered that the officers of the Land Department, acting under the direction of the Secretary of the Interior constitute a special tribunal having exclusive jurisdiction to determine all questions of fact in proceedings affecting the disposition of the public domain. When considered as a tribunal it is inferior in the sense that it is not a court of general juris-

diction having full power to decide conclusively all questions of jurisdiction and all other questions of law arising in the course of its proceedings.

Smelting Co. v. Kemp, 104 U. S. 636-640;

Steel v. Smelting Co., 106 U. S. 447-450;

Barden v. Northern Pac., 154 U. S. 288-327-328.

In *Grignons v. Astor*, 43 U. S. 319, the court had under direct consideration the nature of inferior and superior tribunals, and the nature and conclusiveness of their judgments. In that case it was necessary for the court in answer to arguments of counsel to examine and state the distinction between inferior courts of limited jurisdiction where the record must show jurisdiction and that it was lawfully exercised, and superior courts of general jurisdiction, wherein the record being silent, it will be presumed that jurisdiction existed and that it was lawfully exercised. The court held in that case that in cases arising in superior courts of general jurisdiction the judgment, unless reversed on appeal, is conclusive both of questions of jurisdiction and of the legality of the judgment. Pages 340-41 the court speaking of the effect of judgments of superior and inferior courts said:

“The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction and whether they exist or not is wholly immaterial if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree it can be impeached only by fraud in the party who obtains it. 6 Peters 729. A purchaser under it is

not bound to look beyond the decree: if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provision of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principals are settled as to all courts of record which have an original jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction, they are not inferior courts in the technical sense of the term, because an appeal lies from their decision. That applies to 'courts of special and limited jurisdiction which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction'; that of the courts of the United States is limited and special and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded. 3 Peters 205. They have powers to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless reversed on error or appeal. The true line of distinction between courts whose decision are conclusive if not removed to an Appellate Court, and whose proceedings are nullities if their jurisdiction does not appear on their face, is this: A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to final judgment, without setting forth in its proceedings the facts and evidence on which it is rendered, whose record is absolute verity not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection beyond the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself

to show jurisdiction and its lawful exercise, is of the latter description; *every requisite for either must appear on the face of their proceedings, or they are nullities.*"

It was this principal of law governing the proceedings of special inferior tribunals of limited jurisdiction which Justice Field had in mind when in the Barden case, *supra*, in speaking of what a patent issued under a railroad grant should contain, said:

"Until such a patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff."

The learned justice had in mind the same principle, when in the same case, at page 331, he said:

"But a patent issued in proper form, upon a judgment rendered after due examination of the subject by the officers of the Land Department, charged with its preparation and issued, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings estop the Government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

And the learned justice had in mind the same principal, when at page 330 of the same case, he said:

"The fact remains that under the law the duty of determining the character of the lands granted by Congress, *and stating it in instruments transferring the title of the Government* to the grantees, resposes in the officers of the Land Department."

The officers of the Land Department have no jurisdiction to issue a patent under a railroad land grant

without inserting in such patent a clause which would prevent the passing of title to any mineral land as a result of the patent, unless they have previously decided that all the lands described in the patent are non-mineral. A decision by those officers that the land is non-mineral is necessary to their jurisdiction to issue patent which will convey it. This is shown clearly to be the construction which the court placed upon these special granting statutes in pointing out the method by which the title to lands within the limits of railroad land grants can be set at rest. In the Barden case the court says:

“The Government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which patent is sought sufficiently explored to justify its declaration *in the patent*, which would be taken as its determination, that no mineral lands exist therein.”

It is because the court recognizes that the Land Department, in passing judgment upon questions of fact arising in its proceedings for the disposition of public lands, acts as a special technically inferior tribunal having limited exclusive jurisdiction, that it insists that the facts necessary to the passing of the title under the grant must appear upon the face of the patent itself. The wisdom and reasonableness of this rule will at once appear when we reflect that the findings of fact by the department are final and conclusive, because their jurisdiction to determine questions of fact is exclusive. They cannot, except for fraud, be controverted in any other tribunal having either original or appellate

jurisdiction. If the law did not require the record of the proceedings of such inferior tribunal to show both jurisdiction and its lawful exercise by requiring every fact requisite for either to appear on the face of the proceedings, how could a court ever ascertain whether such inferior tribunal having exclusive jurisdiction to decide questions of fact had misapplied or misconstrued the law under and in accordance with which it claimed to act?

Suppose for instance that in the case at bar the Interior Department had been of the opinion that this granting act did not exclude unknown mineral lands from its operation and should have issued a patent containing no mineral exception clause, and no recitals that the lands described in the patent were within the limits of the grant, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights at the time the line of the road was definitely fixed by the filing of the plat, or that the lands were coterminous to a section of 25 consecutive miles of road constructed, and should include in the patent reserved lands or lands upon which citizens had preemption or homestead claims prior to the definite location of the road, or lands upon which valuable mining claims were being worked, how would it be possible in such cases for the court to determine from the records what decisions were made regarding these matters? The rule obtains that their decisions of such questions of fact are final and conclusive as against another claiming the land, and if the record did not show what they had decided and what they had not decided, it would show no facts upon which any court could apply the law.

It is a well established rule that the erroneous decisions of questions of law by the departments are not binding on courts. *Decatur v. Paulding*, 14 Pet. 479. And in order to know whether or not the department has decided correctly or incorrectly any question of law arising in its proceedings, a court must know how it decided the questions of fact upon which the question of law arose. If the decision of such questions of fact do not appear upon the record it would be impossible to know how the law was construed or applied, so it has been settled beyond controversy that the records of the proceedings of inferior tribunals must show not only the facts upon which they presume to exercise their jurisdiction, but also the facts which will show whether or not they have decided correctly, the questions of law arising upon these facts.

The appellees are therefore confined to the patent and to the records of the proceedings wherein it was issued to show affirmatively that the department erroneously found that the land was non-mineral, which records show affirmatively that no such decision was ever made.

The defendants claim, and the court below held, that the patent pleaded in this suit is in effect a judgment or decree of the Interior Department acting as a tribunal or court. We are willing to concede this contention because in such cases the act must be considered the decree or judgment either of a court of general jurisdiction or of a court of special limited jurisdiction. If it be considered as a judgment or decree of a court of general jurisdiction, then—

“If there is error in it, of the most palpable kind, if the court which rendered it have in the exercise

of jurisdiction disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchases is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given, but not taken in the time prescribed by law.”

Grignon’s Lessee v. Astor, 43 U. S. 340.

It is clear under this doctrine that even if the department be regarded as a superior tribunal of general jurisdiction, it having issued a patent which purports not to convey such of the lands therein described as are non-mineral *such patent remaining* and no appeal to the Secretary of the Interior having been taken from it, the patent must be held valid according to its terms and import, which are due to the construction placed upon the statute by the department.

On the other hand if the patent be considered as a judgment or decree of a court of special limited jurisdiction, then every fact necessary to confer jurisdiction and also every fact necessary to show the correctness of the judgment or patent must appear of record in the proceedings wherein the patent was issued, or the patent is a nullity, and not only is there no record that the department decided that this land was non-mineral, but both the patent and the record of the proceedings in which it was issued bear unmistakable evidence that no such decision was ever made. The bill alleges and the demurrer admits that the department never decided that the land was non-mineral, which decision was necessary to the attachments of the grant made by the statute; it was necessary to identify the lands as those of which absolute title passed by the statute, and it not appearing of rec-

ord in the proceedings wherein the patent was issued, the judgment or patent which concluded those proceedings is either a nullity or the exception of mineral lands is effective, because the statute confers no authority for the inclusion of mineral lands in the patent. The patent states upon its face that neither the Act of Congress under which it was issued, nor the patent itself taken in connection with the statute conveys any lands which are in fact mineral; so it makes no difference which horn of the dilemma the defendants take. A simple application of the law to the facts pleaded in the bill and admitted by the demurrer demonstrates that the defendants have no title to the lands in controversy in this suit. In other words, if the patent be considered as a final judgment of a superior tribunal having general jurisdiction it is valid as a whole and cannot be disputed. If considered as a final judgment of a special inferior tribunal of limited jurisdiction, *there appearing in the proceedings no finding that the land was non-mineral*, the tribunal had no authority in law to issue any patent thereof unless it had authority to issue a patent which would not pass title to any of the lands which might thereafter be found to be mineral. Even if the department had no authority to issue a patent containing this mineral exception clause, it is still true, *that it did not issue one which does not contain that clause*.

It should be observed here that both the record of the proceedings wherein the patent was issued and the patent itself recite a previous determination of every other question of fact necessary to enable a court to determine whether the patent issued was lawfully issued, but that neither of them recites a determination of the non-

mineral character of the land, which determination was necessary to enable a court to determine, as a matter of law, whether it was within the power of the department upon facts found to issue a different patent, viz.: one purporting to pass an absolute title to all the land described in the patent.

The defendants cannot be permitted in one breath to claim that the Land Department in issuing the patent, acted in the capacity of a court of general exclusive jurisdiction, and that its patent is therefore conclusive and final, and thus establish the validity of the patent or final decree and then in the next breath to claim that the same department, in the same proceedings acted in the capacity of a special inferior tribunal of limited jurisdiction, and that therefore they can, in this proceedings, impeach the validity of those parts of the patent, or decree, which prevents their title from attaching to mineral land, which both the statute and the patent state never passed to them. The rule governing these matters, is that this patent is valid and effective according to its terms and import or is a nullity. Speaking of the effect of a judgment sale and confirmation on attachment by the Court of Common Pleas of Ohio, which was a superior court of general jurisdiction, the court said, in *Voorhees v. the Bank of the U. S.*, 10 Peter, 473:

“A judgment or execution irreversible by a superior court cannot be declared a nullity by any authority of law if it has been rendered by a court of competent jurisdiction of the parties the subject matter with authority to use the process it has issued; it must remain the only test of the respective rights of the parties to it, p. 474. * * * The line

which separates error in judgment from the usurpation of power is definite; and is precisely that which denoted the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated or purported to have been so. In the one case it is a record importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings which are irreversible for error, p. 475.”

Again, in *Wilcox v. Jackson*, 13 Pet. 498, 511, the court, in speaking of the nature and effect of the final decisions of the tribunal, said:

“Before we proceed to inquire whether the land in question falls within the scope of any one of these prohibitions, it is necessary to examine a preliminary objection which was urged at the bar, which, if sustainable would render that inquiry wholly unavailing. It is this—that the Acts of Congress have given to the Registers and Receivers of the land offices the power of deciding upon claims to the right of preemption—that upon these questions they act judicially—that no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally into question, so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this court in the case of *Elliott et al. v. Peirsol et al.*, 1 Peters, 340, in these words: ‘Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or

otherwise, its judgment, until reversed is regarded as binding in every other court. But if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void."

Nothing could be clearer from the rulings of the court in these cases than that the patent pleaded in this suit must be held valid and effective however erroneous may have been the construction of the law which induced the officers to issue it, unless it was issued without authority; that is, unless the officers have no jurisdiction or power to issue a patent which would pass title to such of the land as was non-mineral, and would not pass title to such of it as was mineral. It is clear from the patent itself that such is its import and, if the officers had no authority to make or issue such a patent, it is clearly a nullity; under these decisions there is no middle ground.

The Land Department acts as a special tribunal in matters pertaining to the disposition of the public lands. Its jurisdiction to determine questions of fact in those proceedings is exclusive and its findings of fact made therein are therefore final and conclusive and binding upon the courts of the country: *Barden v. Northern Pacific Ry. Co.*, 154 U. S. 288; but while its findings on questions of law are entitled to great respect by the courts they are not binding upon them, if for no other reason because the Interior Department is a branch of the Executive Department of the Government, and therefore cannot in construing statutes exercise judicial powers to an extent which will deprive the courts of power to declare its construction of laws erroneous whenever it is erroneous. There is no law by which an appeal may

be taken from the decision of a question of law by the head of the Interior Department to any court which is a part of the judicial branch of our system of government. The cases wherein courts have held erroneous, in collateral proceedings, the construction of laws and their application to facts found by the executive department are too numerous to require citation of authorities to show the existence of the power, which is derived directly from the very nature of our system of government under the fundamental principles of which every person has a right to his day in court, and need not be dependent for his rights upon an executive officer's notions of what the law is. Ours is a government of law, and not of men.

Now, in the case at bar, the Interior Department has construed the granting statute and the joint resolution to make it their duty to issue to the railroad company patents for the lands answering the record description set forth in the grant "expressly saving and reserving," "all mineral lands," by making the patent express that the United States had granted (by the statute) and did grant (by the patent) such of the lands described in the patent as are non-mineral, and did not, either by the statute or the patent, grant such of them as are mineral. Such is plainly the meaning of the language of the patent. Whether it is effective to pass title to the grantee of these mineral lands raises the following questions of law:

"Did the facts found by the department before the patent was issued, warrant the issuance of the patent issued? Or, did those facts warrant the issuance of a patent stating that the granting statute and the patent

passed an unqualified title to the grantee of all the lands described in the patent:

“(A) If the department had made no decision as to the mineral or non-mineral character of any of the lands described in the patent.

“(B) If the department had decided that all of the lands described in the patent were non-mineral.

“(C) If the department had decided that all of the lands described in the patent were mineral, but were not known at the date of the grant, to be mineral.

“(D) If the department had decided, or had reason to believe that some of the lands described in the patent were mineral, and that some of them were non-mineral.”

The court may have no difficulty in answering correctly any and all of these hypothetical questions, but that is not the point. The point is, that the court cannot tell whether the officers of the executive department answered any or all of these questions of law correctly without first determining accurately what, if anything, the department had previously determined regarding the mineral or non-mineral character of each and every parcel of land described in the patent. The court cannot, therefore, determine whether the executive officers construed and applied the law correctly or erroneously or acted within or transcended the powers conferred upon them by law, unless the records of the departmental proceedings wherein the patent was issued show affirmatively what questions of fact were decided, and what the decisions of them were.

THE PATENT ISSUED CREATES NO PRESUMPTION THAT THE LANDS THEREIN DESCRIBED ARE NON-MINERAL, NOR IS IT AN ADJUDICATION THAT THEY ARE NON-MINERAL.

The defendants attempt to avoid this difficulty by contending that the issuance of the patent creates a conclusive presumption of law, that the department adjudged all the lands described in the patent to be non-mineral before issuing the patent, because such an adjudication was a necessary prerequisite to the lawful issuance thereof, and the court below allowed that contention, and held that, therefore, the mineral exception clause in the patent was inserted without authority of law and was inoperative, void and of no effect to save and reserve to the United States any mineral lands described in the patent.

Let us see to what absurdities this doctrine will lead. It is based upon the argument that neither the record of the proceedings wherein the patent was issued, nor the patent itself shows affirmatively, that the land was adjudged mineral, or that it was adjudged non-mineral, and that therefore, it must be conclusively presumed:

1. That the officers would not have included the lands in controversy in this suit in the patent if they had known that they were mineral; and,

2. That if they did not know that these lands were mineral, it must be conclusively presumed, that they decided that they were non-mineral.

This doctrine and the ruling which allowed it, if permitted to stand, would inevitably confer upon officers of the executive department of the Government, sitting as a special inferior tribunal with limited jurisdiction, all

of the powers of courts of both general and final appellate jurisdiction on all questions of law arising in the course of their proceedings, provided only that such special tribunal, unlawfully neglect and refuse to set forth, in the records or their proceedings, the facts upon which it acted. In reply to any complaint of their erroneous construction, or even wicked disregard of the law, it would be sufficient answer to say:

“The record does not show the findings of fact upon which they decided the questions of law which are claimed to be erroneous; it cannot be determined that the decision was erroneous, or that it was correct; the departmental decision of the questions of fact upon which the law was applied, is final, whatever it was; it must be conclusively presumed that the construction and application of the law, whatever they were, to those facts, were correct; there is no provision of law whereby an appeal on any question of law may be taken to any court which is part of our judicial system. There is no record upon which an appeal may be taken, or which will enable any court, in any separate proceedings, to determine, whether or not, the department misconstrued, or misapplied the law.”

Thus would the executive department of the Government be able to usurp and exclusively exercise judicial function in construing laws, contrary to the constitution and laws as construed by the courts. The only condition precedent to usurpation of this power, would be that the executive officers disobey the law and not keep records of their proceedings while the fact that the law provides that they shall keep such records, and that the fact that they do keep them, (because being a special inferior tribunal of limited jurisdiction, the making of complete records is necessary to the validity of their final judgments), raise the conclusive presumption that,

if they had decided that the land was non-mineral, there would be a record of that decision, and that if no such record exists, no such decision was ever made.

If the contention of the defendants and the ruling of the court, in accordance therewith, be permitted to stand, the fact, established by presumption, that this special inferior tribunal, has disregarded the law in that it made no record of its decision of a question of fact, the making of which was necessary to enable the courts to determine whether its construction of the law was correct or erroneous, becomes the basis of another conclusive presumption that the same tribunal, in the same proceedings, construed and applied the law correctly. Then, as if further to demonstrate the inconsistency of these presumptions, the appellee's claim that this same tribunal, in the same proceedings, erroneously decided that the land was non-mineral, and erroneously construed the law to authorize them to insert in the patent a clause designed and intended to save and reserve to the United States mineral lands it had previously decided did not exist.

All of these inconsistent and contradictory results which would necessarily follow from this alleged conclusive presumption, which defendants seek to invoke, are due to an erroneous assumption that decisions of questions of law by this special, technically inferior tribunal, composed of officers of the executive department, which had only a limited jurisdiction, and which forms no part of the judicial branch of our system of government, and from which there is no appeal to any court which does form a part of the judicial branch of that system, are final and conclusive, while the law is

that its decision of questions of fact are final and conclusive, except in cases of fraud, but that its decisions of questions of law are not final, because it has no final or exclusive jurisdiction to decide questions of law, and no appeal lies from it to any court to correct its errors in law.

All these difficulties disappear with the application of the rule of law that the executive officers of the government acting as a special tribunal—inferior in the technical sense—must state in the record of their proceedings wherein the patent was issued, and in the patent itself, the fact of its decision as to the mineral or non-mineral character of the land, in order that the courts may be enabled to determine whether, under the facts found by the department (which findings of fact are final and conclusive in collateral proceedings), there was any authority of law for the issuance of the patent issued, and also whether it had authority upon facts decided to issue some other and different patent which it did not issue. Every finding of fact necessary to show authority of law for the issuance of the patent issued, must appear on the face of the records of the proceedings, or they are nullities. Therefore, if the record does not show affirmatively that the department decided that all of the lands described in the patent were mineral, or that they were non-mineral, it certainly cannot, on the theory that this inferior tribunal must be conclusively presumed to decide correctly the question of the character of the land, which is admitted to be mineral, be conclusively presumed, that they decided erroneously that they are non-mineral.

A decision that the land was non-mineral could not be a necessary pre-requisite to the issuance of the patent issued, which purports not to pass title to such of the lands as are mineral; therefore *the patent issued* can raise no presumption that such decision was made. The existence of a patent purporting to pass an absolute title to all the lands described in it might raise such a presumption, but no such patent exists in this case and therefore no such presumption rises or exists.

He who alleges an erroneous decision by any tribunal must show it, and in this case, because of the nature of tribunal which issued the patent and its limited powers, such decision must be shown, if at all from the record of the proceedings wherein the error is alleged to have been committed.

It must not be forgotten that presumptions and especially conclusive presumptions of law are indulged by courts to uphold the final acts of public officials and therefore necessarily arise from the *nature and import of the final act done*. The nature and import of the final act determines what must be presumed and the presumption never determines the nature or import of the final act.

A presumption is nothing more or less than a logical inference deducible from facts and circumstances known. It is inconsistent with reason to say that such inference which owes its existence to facts established can change those facts, or create by way of another inference the facts from which it arises.

This very case affords a fine illustration of the fallacy of the appellee's contention that the patent issued

creates a conclusive presumption that all the lands therein described are non-mineral, or, in another form—that the issuance of the patent was a complete adjudication that all the land described in it is non-mineral. The patent purports to pass title of such of the lands therein described as are non-mineral and not to pass title to such of them as are mineral. By what process of logic or reason can it be inferred that the officers who prepared such a patent had previously decided that all the lands described in it were non-mineral? Is it reasonable or logical to *presume* that they meant to exclude from the effect of the patent mineral lands which they had decided did not exist? The fact that they undertook to exclude mineral lands from the effect of the patent is not only evidence but is proof that they were satisfied that some of the lands described in the patent were mineral. The fallacy of the appellees' argument on this point is apparent in this: They assume that the officers who issued the patent had no authority in law to issue the patent which they did issue, and that they ought to have issued another and different kind of patent, viz.: One purporting to pass an absolute title to all the lands described in the patent issued. Then from such patent, which they claim ought to have been, but was not issued, they deduce their alleged conclusive presumption and then apply it to another kind of patent actually issued for the purpose of changing by a species of legal fiction the patent issued in such manner that it will read as they want it to read.

The difficulty is that no patent which could give rise to the alleged presumption was ever made or issued for

the lands in controversy and therefor no such presumption concerning these lands ever existed.

The validity of the patent issued does not require a previous decision by the officers that the land is not mineral. Therefore it raises no presumption that such decision was made. It is true that if such decision was made the officers would have had no authority or reason for expressly excluding mineral lands from the effect of the patent, because such decision would render them non-mineral within the meaning of the statute after the issuance of the patent upon such decision, regardless of whether they contained mineral or not, and no one could question the correctness of that decision except in a direct proceeding to annul or cancel the patent.

THE OFFICERS OF THE INTERIOR DEPARTMENT HAD AUTHORITY IN LAW TO ISSUE THE PATENT PLEADED IN THIS CAUSE, WHICH PURPORTS TO PASS TO THE RAILROAD COMPANY SUCH OF THE LANDS THEREIN DESCRIBED AS ARE NON-MINERAL AND NOT TO PASS TITLE TO IT OF SUCH OF THEM AS ARE MINERAL.

We do not contend that if it be once established that the department decided that all the lands described in the patent are non-mineral, we have a right to show that such decision was erroneous, but we do contend:

1. That neither the patent nor the record of the proceedings where in it was issued shows that such decision was made, and that it can be shown from no other source.

2. That both the record and the patent shows affirmatively that such decision was not made.

3. That such decision cannot be presumed to have been made because the record leaves no room for such presumption.

The bill alleges and the demurrer admits that at the time the patent issued there was no law, state or federal, or any custom or usage of miners in force in the mining district where the lands were located requiring or allowing notice of mining locations to be filed in either the local land office or the General Land Office before application for patent. [R. 100.] The decision of the officers as to the mineral or non-mineral character of the land was expressly limited to the statement that no mining claims appeared of record or on file in those offices. [R. 125.] The laws then in force required or allowed the filing and recording of notices of mining locations in the office of the recorder of the mining district or the recorder of the county wherein the claims were located. It could not be assumed that patent had been applied for on every claim located prior to the issuance of the patent to the railroad company, nor can it be assumed that it was the intention of Congress or of the department to divest by the patent, all the rights of mineral locators who had not applied for patent prior to the issuance of the railroad company's patent. This is plainly shown by the exclusion of all mineral lands made in both the patent and the act under which it was issued.

Cowell v. Lammers, 21 Fed. 200, is a case upon which appellees rely to establish the invalidity of the mineral exception clause contained in the patent. In that case the patent was issued under a railroad land

grant which provided, "That all mineral lands shall be excepted from the operation of this act" and the patent contained the clause "Yet excluding and excepting all mineral lands should any such be found to exist in the contracts described in the foregoing."

Judge Sawyer, who wrote the opinion in this case and in *Francoeur v. Newhouse*, *infra*, was committed to the proposition that the granting statute excepted from its operations only lands known at the time of the grant to be non-mineral. It appears from the recital of facts in that case that the land was in the actual possession of another who had purchased it from the railroad company, and prior to the patenting of it to the railroad company the land had been worked as a placer mining claim and had been abandoned because it did not pay, and that at the time the patent was issued the land was considered of no value as mineral land. Judge Sawyer held that a mineral locator could initiate no right upon the land where it was in the actual possession of another under color of title. It is true that he also held that there was no authority in the statute for the insertion of a clause in the patent excluding mineral land from the conveyance. As a reason for this he states that the records and notes of the survey and the evidence upon which the character of the land must be determined *prima facie*. This holding, of course, was overruled in the Barden case, where it is distinctly held that the law does not contemplate the ascertainment of the mineral or non-mineral character of the land from the field notes of the survey, but that the information furnished by those notes is gathered incidently for the use of the Interior Department. He also holds that such an

exception could in no case apply to mineral lands which were not at the date of the patent known to be mineral.

Francoeur v. Newhouse, 40 Fed. 318, upon which defendants also rely further explains the position of Judge Sawyer and his consideration of the statute in Cowels v. Lammers. In Cowels v. Lammers, he held, among other things, that the exception in the patent only applied to lands known at the date of the patent to be mineral, and as the word "known" was not in the patent; to be consistent he saw that he must hold in Francoeur v. Newhouse that the statute, which did not contain the word "known" in connection with the exclusion of mineral lands, must also be construed to mean lands known at the date of the grant to be mineral, if the decision in Cowels v. Lammers was correct.

Judge Sawyer was certainly consistent in the position which he took, but it is not consistent to say that the language of the granting act, "all mineral lands", means all mineral lands known or unknown, and that the same language in the patent means all known mineral lands, but does not mean unknown mineral lands. There is no reason for construing this language as meaning one thing when used in the patent and meaning something else when used in the statute. Therefore, we say that the exclusion clause contained in the patent was interpreted by the Supreme Court in the Barden case when it interpreted the clause excluding all mineral lands from the operations of the statute, it is said that all mineral lands mean *all mineral lands*, and does not mean all *known* mineral lands.

Judge Sawyer was of the opinion that only lands

known to be mineral at the date of the grant were excluded from the operation thereof, and this opinion was the basis of his decision both in the case of *Cowell v. Lammers* and *Francoeur v. Newhouse*. Both of these cases were decided before the opinion in *Barden v. Northern Pacific*, 154 U. S. 288, was written and when the Supreme Court held in that case that the words "All mineral lands" mean all mineral lands whether known or unknown, and that they do not mean "All known mineral lands," all the reasoning of Judge Sawyer was of no avail. It is not too much to say that the *Barden* case deprives both the cases of *Cowell v. Lammers* and *Francoeur v. Newhouse* of all their force as authorities because the *Barden* case also holds that the officers of the Interior Department may lawfully insert in the patent a clause excepting mineral land if they have not made sufficient examination of the land described in the patent to justify their statement in the patent that all the land therein described is non-mineral.

Shaw v. Kellogg, 170 U. S. 312, is another case upon which appellees relied to sustain their contention in the case at bar, and it does not, for the reason that in that case there was a decision of the proper officers after an examination and determination that the land was non-mineral in fact. The grant was of a privilege to the heirs of one Baca, who claimed the land upon which Los Vegas in New Mexico is located, to select in lieu thereof "an equal quality of vacant land, non-mineral, in the territory of New Mexico" and the Act of Congress made it "the duty of the surveyor general of New Mexico to

make survey and location of the land so selected" upon application to him by the beneficiaries of the grant.

Instructions were sent to the surveyor general by the General Land Office to the effect that his certificate of the survey and location to the General Land Office "must be accompanied by a statement from the register and receiver that the land is vacant and not mineral." Application was made by the beneficiaries of the grant for a survey. The surveyor general of Colorado in whose jurisdiction the territory wherein the selection was made had been included, wrote the General Land Office, "I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca floats, and he intended to locate it as this is located, for the reason that, in his opinion, it would cover rich minerals in the mountains."

In reply the General Land Office informed him also, directly, that his certificate of the survey and location "must be accompanied by the certificates of the surveyor general and the register and receiver, that the land selected is vacant and non-mineral," and added:

"Especially should the character of the locations as to minerals be carefully ascertained after the important statement of Ex-Governor Gilpin which you communicated in your official letter to this office. When you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to do so, you will transmit to this office your official certificate setting forth these facts.

"You will also correspond with the register and receiver of Colorado, when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the

same conditions that your own is to be furnished under, which, when received, you will forward to this office."

Survey of the land was made under contract with one Sheldon which was disapproved and the surveyor general was again told that the certificate of the survey and location must be accompanied by the certificates of the surveyor general and the register and receiver, that the land is vacant and not mineral.

Thereafter the surveyor general sent to the General Land Office the following certificates as to the character of the land:

"Denver, C. T., Dec. 15, 1863.

Sir:—

This is to certify that from good and sufficient evidence, I am perfectly satisfied that the land on which the heirs of Luis Marie Baca have located their grant No. 4 in the San Luis Valley, and marked out by the survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

Very truly your obedient servant,

JOHN PIERCE,
Surveyor General of Colo. & Utah."

"Colo. Ty. Golden City, Dec. 5, 1863.

Sir:

This is to certify that from good and sufficient evidence, we are perfectly satisfied that the land on which the heirs of Luis Marie Baca have located their grant No. 4 in the San Luis Valley, and marked out by the survey made by Albinus Z. Sheldon, in November, 1863, is not mineral and is vacant.

G. N. CHILCOTT,
Register Land Office Colo. District.

C. B. CLEMENTS,
Receiver Land Office Colo. Ty."

To this the General Land Office replied:

“Evidence furnished by you is not sufficient in the opinion of this office to prove that the selection of No. 4 does not cover valuable mineral deposits. Your certificate is not based upon actual knowledge of the facts, but upon information and conclusions deduced from reason. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of Ex-Governor Gilpin officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality.”

On Feb. 12, 1864, the General Land Office again wrote to the surveyor general in part as follows: ,

“The difficulty, however, may be avoided by pursuing the following course: The general field notes duly verified and authenticated, must be filed in the surveyor general’s office of Colo.; upon bringing these to the usual satisfactory tests and finding the same all regular and correct, you are authorized in virtue of the aforesaid sixth section of said Act of June 21, 1860, to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights if such exist.”

This was plainly an adoption of the survey made by Sheldon as the survey of the surveyor general after satisfactory tests and examination of that survey by him, and after the determination by him that the survey was correct. The field notes of this survey, given on pages 322 and 323, set forth a very careful statement as to the character of this land and concludes with this statement:

“Saw no indications of the precious metals or other minerals of any kind, unless the presence of

iron may be inferred from the fluctuations of the needle set forth in the notes.”

The map of the survey was also filed and approved by the surveyor general.

On January 14, 1868, application for patent was made and refused on the ground that the statute did not authorize the issuance of the patent, and in denying the application the commissioner of the General Land Office called attention to the fact that before locating the land “the surveyor general had expressly found and certified that this land was not mineral” and the construction placed upon that act by the Interior Department is set forth by the commissioner in his letter as follows:

“The condition and provisions of the Act of June 21, 1860, were as respects this question, that the selection and location should be on land determined at the time of such location when the title passed to be non-mineral land.”

It will be noted that there was in this granting act no provisions excepting mineral lands from the *operations* of the act. The land was not granted *in praesenti* by the statute. No title could pass under the statute until the determination and decision was made by the proper officers that the land was non-mineral, and that when such decision was made the title passed and that the decision that it was non-mineral was made by the proper officers, and the records of the proceedings for the *passing of the title by the officers of the department, showed that the necessary decision as to the character of the land was made.* This case is clearly an authority for the proposition that whenever a grant of public lands, of any particular character is made, either by the statute

or by a patent, there must be a determination by the proper officers that the land is of the character granted and that such determination must appear as a part of the records of the proceedings of the officers of the Interior Department, whose duty it is to carry the grant into effect. That the court considered such finding and record necessary to the passing of the title, is evidenced in this opinion by a quotation from the case of Deffenback v. Hawke, 115 U. S. 392, 404, as follows: "The land officers who are merely agents of the law, had no authority to insert in the patent any other terms than those of the conveyance *with recitals showing compliance with the law and the conditions which it prescribes*" (italics ours), and also by the court's consideration of the decision made in the Barden case. Speaking of that case at page 339, Justice Brewer, who dissented in the Barden case, uses the following language: "It is true there was a division of opinion, but that division was only as to the time at which *and the means by which the non-mineral character of the land was settled.*" (Italics ours.) That an examination and determination of the character of the land and the statement of that determination in the patent were the *means* by which the character of the land should be settled, is further evidenced by other quotations from the Barden case in Shaw v. Kellogg, as follows: "It can hear evidence upon and determine the character of lands to which the parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimants the patent provided by law, *specifying that the lands are of the character for which patent is authorized*" (italics our own); and again, "the fact remains that under the

law the duty of determining the character of the lands granted by Congress *and stating it in instruments transferring the title* of the Government to the grantees, reposes in officers of the Land Department.” (Italics ours.)

The grants under the statute considered in *Shaw v. Kellogg* was completed by the selection, the survey and location of the land and the finding by the proper officers that the land was non-mineral. The evidence of the title was the records of these proceedings. No one will contend that if the records of those proceedings did not show affirmatively a determination that the land was non-mineral, the title could have passed.

The views of the court below as to the effect of the saving clause in the patent are tersely stated in the opinion as follows:

“There is absolutely nothing in the saving clause of the joint resolution either requiring or authorizing the patent thereby directed to be issued for the granted lands to contain those conditions or restrictions or any of them. If such patents were thereby required or authorized to contain one of the conditions or restrictions, then manifestly they were required to contain all of them, for no distinction is made between them by Congress and none can be found in the language of its acts in question. Clearly, therefore, if the contention of the complainant’s counsel is correct that by the joint resolution of June 28th, 1870, Congress required that the patents to be issued to the railroad company for lands within the grant made to it should contain an exception of all mineral lands, they were likewise required to contain a similar exception of all lands reserved, sold, granted or otherwise appropriated, and all lands to which the United States did not have full title, and which were not free from preemption or other claims or rights at the time the

line of the grantee's road was designated by the plat thereof, filed in the office of the commissioner of the General Land Office. There is no escape from this conclusion, for I repeat that the statute makes no distinction between the conditions and restrictions of the grant, save only the rights of actual settlers therein expressly specified, and no distinction in the other conditions and restrictions of this grant has been or can be suggested by counsel for the simple reason that the statute contains none."

In the first place there is a manifest difference between authorizing and requiring these conditions and restrictions to be saved and reserved in the issuing of the patent, and authorizing and requiring them to be saved and reversed by any particular means or method in the issuing of the patent.

The inherent powers of the executive department are ample authority under these acts for the issuance of the patent issued thereunder. Neither the act or the joint resolution directs the Secretary of the Interior or any other government official to save and reserve the restrictions of the grant to mineral lands by determining prior to the issuance of the patent what of the odd numbered sections within the limits of the grant are mineral and what are non-mineral, and to include in the patent only non-mineral lands; nor does either the act or the joint resolution specify any other method or means by which these restrictions and conditions are to be saved or reserved in the issuing of the patent; but they clearly make it the duty of the Secretary of the Interior "to cause patents to be issued to said company for the sections of land coterminous to each constructed section of land reported on as aforesaid to the extent and amount

granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

This language is a clear direction to the Secretary of the Interior to cause to be issued patents expressly saving and reserving the specific conditions and restrictions contained in the third section of said act; and under it the patent must express, *in some way*, the saving and reserving of all these conditions and restrictions which are, in respect to the means by which one could determine to what lands they apply, of two classes:

1. The records of the land office required by law to be kept would reveal of what of the lands the United States had full title, and what of the lands were not reserved, sold, granted or otherwise appropriated, and what of the lands were free from pre-emption or other claims or rights at the time the line of the road was definitely fixed.

2. The records of the land office would not show what of the lands within the limits of the grant were mineral and what were non-mineral, for the simple reason that there had been no record of all mineral lands made, nor was there any provision of law for the making of such a record, and the mineral or non-mineral character of the land within the limits of the grant could be determined only after extensive exploration and examination of all of the lands.

The officers of the Interior Department expressed, in the patent, the savings of the restrictions and conditions of the former class by examining the records of the land office and including in the description of the patent only

lands to which these conditions and restrictions did not apply, and also by distinct recitals in the patent that none of the lands therein described were subject to claims or rights which brought them within any conditions or restrictions of the former class.

The officers could not determine from the records of the land office what of the lands were non-mineral; they made no examination of the land themselves with a view to determining their mineral or non-mineral character, but sought to save and reserve the limitation and restriction of the grant to non-mineral lands by issuing a patent which would pass title to such of the lands as were non-mineral and would not pass title to such of them as were mineral.

The means by which, and the manner in which those officers should have saved and reserved these conditions and restrictions of the grant were, in the absence of specific directions prescribed by law, matters entirely within their discretion, and it is not necessary for them to show affirmative statutory authority for everything they do in the discharge of their duties, much less for the means by which they accomplish the results required by the acts of Congress. This was settled as early as 1833 in *United States v. Macdaniel*, 7 Pet. 1.

McDaniel had been a clerk in the Navy Department at a salary of \$1400 per year for 15 years, and had also acted as agent of the government in paying pensions and had been allowing commissions on his pension disbursements as such agent. Under a new construction of the statute by the department he was not entitled to these commissions and the United States sued him to recover \$988.96 which he did not owe if these commissions were

allowed to him. The Supreme Court held that the custom or usage which had obtained in the department under the former construction of the statute was binding as to past transactions and that McDaniel was entitled to the commissions and that the United States could not recover them from him. In that case the court said:

“A practical knowledge of the action of one of the great departments of the government must convince every person that the head of the department, in the distribution of duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his power by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of the government would evince a most unpardonable ignorance of the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined and which are essential to the proper action of the government; hence, of necessity, usages have been established in every department of the government which have become a kind of common law and regulate the rights and duties of those who act within their respective limits, and no changes of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction of it, and must be considered binding on past transactions.”

The cross bill alleges [R. 123] and the demurrer admits that for the forty years immediately preceding the issuance of this patent it had been the uniform custom of the Interior Department to issue, under all railroad land grants, patents containing the mineral exception

clause found in this patent, which was issued in conformity to that custom. This custom arose and obtained during all that time under the same construction of these grants by many successive secretaries of the interior and none of them doubted that these patents were effective to save the mineral land therein described to the United States. Hundreds of thousands of acres of the most valuable mineral lands in the western states have been included in the descriptions of such patents issued under these grants to railroad companies which have accepted them, without protest, and with full knowledge of their nature and import, and with full knowledge of the fact that the reason why the patent purports to except mineral lands is that there had been no prior examination and determination of the character of the land, and that the government officials relied upon the import of the patent prepared and issued under this construction of the statute to save mineral lands to the United States.

Now, the question is, whether the action of the department in undertaking to save and reserve the limitation of the grant to non-mineral lands, by incorporating in the patent a saving clause, shall be binding and effective as to past transactions to keep the grant limited to non-mineral lands, or whether that clause which, if effective, will accomplish the intention of Congress, shall be adjudged void and the rest of the patent valid, and the will and intention of Congress expressed in the statute and patent be defeated and hundreds of millions of dollars worth of mineral land, which Congress has said should not pass by operation of this grant, be turned over

under it to this corporation, contrary to the express provisions of its grant.

It must be remembered that if the government officers had no authority to issue the patent which they did issue, yet the fact remains that *they issued none other*.

No injury can result to the railroad company from an adjudication that the patent is effective to save and reserve mineral lands to the government, for it would deprive the railroad company of nothing which was granted, while if it is not held effective, the railroad company will acquire title to lands which it is by law prohibited to acquire under the grant.

THE GREAT WEIGHT OF AUTHORITY IS TO THE EFFECT THAT THE SAVING CLAUSE IN THE PATENT IS EFFECTIVE AND LIMITS THE TITLE OF THE RAILROAD COMPANY TO LANDS NON-MINERAL IN FACT.

McLaughlin v. Powell, 50 Cal. 64.

In this case plaintiff held by mesne conveyance from the railroad company, which claimed to have acquired title by a patent dated May 31, 1870, issued to it under the railroad land grant of July 1, 1862, and July 2, 1864. The patent contained the clause:

“Yet excluding and excepting from the transfer by these presents ‘all mineral lands’ should any be found to exist in the tracts described in the foregoing.”

The defendant offered to prove that the land was mineral land, that he had held it as a mining claim since October, 1866. The trial court excluded this evidence and the plaintiff recovered. The Supreme Court reversed the case for the exclusion of this evidence and said:

“The exception contained in the patent is part of the description and is equivalent to an exception of all of the subdivisions of land mentioned, which are ‘mineral lands,’ in other words, the patent grants all of the tracts named in it which are not mineral lands. If all are mineral lands, it may be that the exception is void; but the fact cannot be assumed, as by its terms the exception is limited to such as are mineral lands and does not necessarily extend to all the tracts granted.

“We think the defendant should have been allowed to prove that the demanded premises were mineral lands. Judgment reversed.”

Chicago Quartz Mining Co. v. Oliver, 75 Cal.

194.

The land was claimed by mesne conveyance from the railroad company who claimed to have acquired title by patent issued to it under the railroad land grant of July 1, 1862, and July 2, 1864. The defendant claimed under the mining patent dated August 16, 1883, the court below found that the land in dispute had been known and worked as mineral land since 1861. The patent to the railroad company contained the following clause:

“Yet excluding and excepting from the transfer by these presents ‘all mineral lands’ should any be found in the tracts described in the foregoing.”

The court held that the mining patent of 1883 was valid and that the land did not pass to the railroad company under its patent issued under the railroad land grant.

Gale v. Best, 78 Cal. 235.

The plaintiff sued and recovered land from the defendant. Plaintiff held it by mesne conveyance from a railroad company under a grant by Congress. The

granting act excluding all mineral lands. The patent issued under that grant *contains no clause excepting or excluding mineral lands from the operations of the patent*. The defendant in 1885 located the land as mineral and began mining operations thereon; the court held that as there was no reservation or exception of mineral lands in the patent, the patent raised a conclusive presumption, against collateral attack, that the land was non-mineral, and the plaintiff recovered. In this case the court affirmed the doctrine of *McLaughlin v. Powell, supra*, and *Chicago Quartz Mining Company v. Oliver, supra*, and said that those cases differed from the one then at bar *because in those cases the patent excepted "all mineral land" should any such be found therein*.

In *Van Ness v. Rooney*, Vol. 41 Cal. Dec. 695, the Supreme Court of the state of California reaffirmed the doctrine of *McLaughlin v. Powell* and *Chicago Quartz Mining Company v. Oliver*, and held the mineral exception clause in the patent valid. That the Federal statute of March 2, 1896, was not applicable to a patent containing such mineral exception clause, and that such patent does not create a conclusive presumption that the lands therein described are non-mineral, and that the mineral exception clause is a part of the description of the land mentioned in the patent.

In *Eastern Oregon Land Company v. Willow River Land and Irrigation Company*, an opinion by Judge Bean filed November 10th, 1910, held that the railroad land grant patent containing the clause "yet excluding and excepting all mineral land should any such be found in the tracts aforesaid," "manifests an intention on the part of the government not to convey mineral lands and

repels any inference that the department adjudicated or intended to adjudicate that no part of the land described in the patent was mineral.”

Here is an unbroken line of authorities entitled to great respect by this court to the effect that the mineral exception clause contained in the patent here pleaded is valid and effective and prevents mineral lands from passing either by the granting act or the patent.

THE DISCUSSION OF THE JOINT RESOLUTIONS IN THE SENATE DOES NOT SHOW THAT THE SAVING CLAUSE THEREOF WAS INTENDED ONLY TO PROTECT ACTUAL SETTLERS.

The court below was of the opinion that the discussion in the senate of the joint resolution, at the time it was passed by that body, shows that the clause in the joint resolution:—“expressly saving and reserving all the rights of actual settlers together with the other conditions and restrictions provided in the third section of said act”—was solely for the purpose of protecting actual settlers upon the lands along the line of the road, and that the resolution furnished no authority for the issuance of a patent containing a mineral exception clause.

This discussion is found in the Congressional Globe, part 5, second section, 41st Congress, 1869-70, May 31st, 1870, pp. 3350-51-52-53. Practically all that was said in the discussion was said by Senator Casserly of California. He desired to have the senate adopt in place of the language of the resolution last above quoted, the following language as a part of the resolution:

“And provided, that all persons who before the passage of this joint resolution shall have located themselves as actual settlers upon any portion of the lands affected by this joint resolution, or by the said act of July 27, 1866, or included in the lands withdrawn by order of the Secretary of the Interior of March 18, 1867, or at any other time, for or on account of said Southern Pacific Railroad Company, whether such persons shall have so located themselves before or after such withdrawal, shall have the right to enter, under the homestead or pre-emption laws of the United States, the lands upon which they have so located themselves in the quantities allowed by said laws, and upon the terms provided thereby.”

It will be noted that this amendment which Mr. Casserly desired substituted for the amendment which was adopted, says absolutely nothing about saving anything but the rights of actual settlers, while the amendment which was adopted, viz.—“Expressly saving and reserving of the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act”—includes all the conditions and restrictions of the third section of the Act of July 27, 1866. The court evidently became confused on this point, for certainly what was said by Mr. Casserly in the senate at the time the joint resolution was passed furnishes no aid in the construction of the resolution as it was passed. The amendment which Mr. Casserly desired was rejected, which was a rejection of his argument.

Moreover, it will be noticed that the joint resolution of June 28th, 1870, says that the company may construct its road *as near as may be* on the route designated by the map filed by said company in the Interior Department on the 3rd of January, 1867. The route indicated by that map has always been considered as the general

route, and the map, as the map of general location and not of definite location; therefore, the rights of actual settlers upon the land were fully protected under the Act of July 27th, 1866, for the simple reason that the railroad company could acquire no right to any land along the line of the road until the map of *definite* location was filed, and it had not been filed at the time the joint resolution was passed.

Southern Pacific Company v. Rahall, 3 L. D. 321.

It is therefore clear that the clause in the joint resolution requiring the saving in the patent of the conditions and restrictions contained in the 3rd section of the Act of June 27th, 1866, was for some special purpose, and that purpose could be nothing else than to authorize the Secretary of the Interior to insert in the patent an appropriate clause to save and reserve to the United States those restrictions and conditions of the grant in cases where the records of the land office did not show to what lands those restrictions and conditions applied, and those records would show what lands were occupied by settlers, but would not show what were mineral.

THE GRANT WAS OF LANDS TO THE AMOUNT OF TEN ALTERNATE SECTIONS PER MILE OF ROAD AS STATED IN THE ACT, AND NOT TO THE AMOUNT OF TWENTY ALTERNATE SECTIONS PER MILE OF ROAD AS STATED IN THE PATENT.

In the 3rd section of this act, the words "to the amount of ten alternate sections per mile" specify the amount of land granted per mile of road. The words "on each side of said railroad" specify where the land granted

must be taken. The words "every alternate section of public land, not mineral, designated by odd numbers," prevent the leaving of worthless sections and taking good ones and gives the sections nearest to the line of the road both in primary and lieu limits.

The department admits this construction in that, in the patent, it uses the language "every alternate section of public lands designated by odd numbers to the amount of 20 alternate sections per mile on each side of said road" to describe 20 sections per mile of road—ten to be selected on each side thereof—the identical language used in the statute to describe the lands granted for road built in territories.

The words "on the line thereof, and within the limits of 20 miles on each side of said road," in the patent, are entirely superfluous, tautological and redundant, if "ten" were written lieu of "twenty" in the patent; because the words "every alternate section designated by odd numbers" would necessitate selection of the land on the line of the road. The words "within the limits of twenty miles" were evidently thought necessary, in the patent, because the word "twenty" had been used in lieu of the word "ten," and it was apparent that to give, in the patent, the same meaning to the language "every alternate section of public land to the amount of 20 sections per mile, on each side of said railroad" that was sought to be given it in the act, would amount to a declaration that the railroad company could take, in states, twenty alternate sections on one side of the road and then twenty alternate sections of the other side thereof, which would make "land to the amount of" forty "sections per mile of said railroad," which would reveal the absurdity of

the department's interpretation of the statute. Therefore, the words "and within the limits of twenty miles" were added in the patent, with the result that if the same identical language: "Every alternate section of public land to the amount of twenty alternate sections, on each side of said railroad," is given the same interpretation in the patent that the department gives to it in the statute, the words "and within the limits of twenty miles" are contradictory, because there would not be the quantity of odd numbered sections within twenty miles of the line of the road necessary to give the forty sections per mile called for in the patent. The words "on each side of said road" added in the patent are purely repetition.

Section 6 of the act provides:

"The president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the *entire line of said road*, after the general route shall be fixed, and as fast as may be required by the construction of said railroad." This provides for the making of a survey designed to fix the primary and lieu limits of the grant, and designate, by odd numbers, the sections from which both the granted and lieu lands must be taken, in order that both the granted and lieu lands may be patented to the grantee under the provisions of the 4th section of the statute,—*"as fast as every twenty-five miles of said road is completed as aforesaid."* This survey was to proceed with the construction of the road, or *"as fast as may be required by the construction of said railroad,"* so that before making the survey of the lands granted the surveyors would know exactly where the line of the road was and make the survey conform to

the grant, and not be obliged to survey a large quantity of lands in excess of those granted, in order to cover the grant by allowing for changes from the general to the definite route of the road.

Now, this survey is to be made, according to the statute, forty miles wide, and is to extend on both sides of the entire line of the road, or twenty miles each way from the line of the road. Such is plainly the survey designed by Congress to cover the lands granted, both primary and lieu, and it covers exactly twenty odd numbered sections of land per mile of road, ten of which fall upon one side of each mile of the road and ten upon the other side. In states the first ten miles each way from the road measure the primary limits of the grant; the second ten miles each way from the road measure the lieu limits of the grant. In territories the survey extends twenty miles each way from the line of the road, the same as in states, and measure the primary limits of the grant in territories, where there are no lieu limits, because the statute requires all lieu lands to be selected "in alternate sections, and designated by odd numbers not more than ten miles beyond the limits of said alternate sections," "nearest to the line of said road" and "within twenty miles thereof," and, after the twenty alternate odd numbered sections per mile of road called for by the patent are taken as the primary lands, granted in territories, all the alternate odd numbered sections therein, within twenty miles, each way from the road, are taken as primary lands, and there are none left in territories from which lieu selections can be made "within twenty miles" of the road. All the alternate odd numbered sections then remaining within twenty miles of the road are within the states,

and are over ten miles and less than twenty miles from the line of the road, where all lieu selections must be made.

That all lieu selections must, under this statute, be made nearest to the line of the road and within twenty miles thereof appears conclusively from the provision in the statute for the selection of "unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, and *within twenty miles thereof*," "as above provided," in lieu of mineral lands found in the odd numbered sections within the primary limits of the grant, because this provision read with the language of the act to which the words "as above provided," refer, viz.: "other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." These two provisions read together, as they must be read, clearly define the lieu limits of the grant, within which all lieu land must be selected, as lying and being "not more than ten miles beyond the limits of said alternate sections" (which sections all fall within the primary limits of the grant) and "within twenty miles" of the road.

If the statute be construed to grant, in states, as primary lands, ten alternate odd numbered sections per mile on one side of the line of the road and ten alternate odd numbered sections per mile on the other side thereof, which would make primary lands "to the amount of twenty alternate sections per mile" of road, as stated in the patent, then every alternate odd numbered section "within twenty miles" of the line of the road on both

sides would be necessary to supply the primary lands under such construction of the grant, and whenever any of said alternate sections are "mineral lands" or "shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, no "other lands" could be "selected by said company in lieu thereof under the direction of the Secretary of the Interior in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate section" and "within twenty miles" of the road, because there would be no sections answering this description, *as to location*, after the primary or granted lands were taken.

The grant was therefore of land "*to the amount of ten sections* (approximately 6,400 acres) per mile" of road built within the state of California. (See construction of this statute by Secretary Lamar November 25th, 1887, 6 Land Decisions 351, and *Southern Pacific v. United States*, 183 U. S. 525.)

This is the only construction of the statute possible.

From the list of selections made by the Southern Pacific and the findings of the officers of the General Land Office, which were presented, with that list, to the secretary, for his approval and certifications, it appeared to him that his approval of that list and the patenting of the lands therein to the Southern Pacific would create an excess over the quantity of lands to which the Southern Pacific was rightfully entitled, because the list of selections number 19 contained 440,900.85 acres of land; the findings of the officers of the General Land Office, which were presented with this list to him for his approval and certifications, recommended the certification and patent-

ing of all of these 440,900.85 acres of land as land accruing to the Southern Pacific for construction of 40,599 miles of road, for the construction of which the Southern Pacific would be entitled to receive but 6,400 acres per mile or 259,577.6 acres, for the whole 40,559 miles, after it completed enough of its road to make up the last section of 25 miles of its road.

Therefore, it appeared to the Secretary of the Interior, upon the face of that list and the findings of the officers of the Land Department, that the certification and patenting of the lands contained in that list would create an excess of 181,323.25 acres over the quantity of lands to which the Southern Pacific could be entitled under its grant, and more, because this 40,559 miles of road were the last miles constructed by that company and it had previously received patents of lands to the amount of nearly 12,800 acres per mile for all of the other 212.32 miles of road constructed under the grant, which fact also appeared from the records of the Interior Department.

Section 7 of the Act of March 3rd, 1887, reads as follows:

“That no more lands shall be certified or conveyed to any state or corporation or individual for the benefit of either of the companies herein mentioned, when it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such state or corporation or individual would be rightfully entitled.”

It is plain that under these circumstances the officers of the Interior Department had no authority or jurisdiction either to certify or patent these lands to the Southern Pacific Railroad.

This being true, both the certification and the patent are absolutely void—not voidable, but void, and were of no force or effect whatever, and no direct proceedings are necessary to cancel or vacate them.

See

Dolan v. Carr, 125 U. S. 618, and cases there cited.

Now, it is true that all the lands in controversy in this suit are within ten miles of the line of the road as fixed by the map of definite location of the road, and that the road was constructed upon that line and that these lands are within the primary limits under the proper construction of the grant.

If the court hold that the patents are void only as to the excess of lands therein described, yet the lands here in controversy must be and are excepted from the operation of the patent, for the reason that, even under such ruling, the question arises: What land shall be held to constitute the excess? The descriptions of lands in these patents purporting to convey only granted or primary lands, include all the lands which could pass under the grant either as primary or lieu lands.

Then we must look to the granting act to determine what particular lands described in the patent must be held to be excess. The act provides:

“That all mineral lands be and the same are hereby excluded from the operations of this act and in lieu thereof a like quantity of unoccupied unappropriated agricultural lands in odd numbered sections nearest to the line of said road and *within twenty miles* thereof may be selected as above provided.”

The patent and the proceedings show that all such lands within twenty miles of the road are included in the patent. Therefore the railroad company loses nothing by not being allowed to hold these mineral lands.

The appellees seek to avoid this difficulty by claiming that they can select as mineral lieu lands those lands within the primary limits of the grant to which some claims had attached, prior to the filing of the map of definite location, and which claims have been abandoned or cancelled. Not to mention the fact that the statute contemplates that both granted and indemnity lands may be selected and patented at the same time, the decisions of the Supreme Court hold that no claim to lands claimed by others before the road was definitely located can be founded on this granting statute.

The Supreme Court has uniformly held that land within the place limits, which had been claimed, reserved or sold prior to the filing of the map of definite location, cannot be taken under the grant, although the United States subsequently obtains full title and the land is freed from such reservations and claims. The language of Justice Miller, in the *K. P. R. Co. v. Dunmeyer*, 113 U. S. 629, is:

“No such land passes by this grant. No interest in the railroad company attaches to this land or is to be founded on this statute.”

And in this same case the court states the reason why Congress intended not to permit any right in the railroad company to attach to such lands.

“The company had no absolute right until the road was built, or that part of it which came through the land in question. The homestead man

had five years of residence and cultivation to perform before his right became absolute. The pre-emptor had similar duties to perform in regard to cultivation, residence, etc., for a short period, and then payment of the piece of the land. It is not conceivable that Congress intended to place these parties as contestants for the lands with the right in each to require proof from the other of complete performance of its obligations. Least of all, is it to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil whom it had invited to its occupation, this great corporation with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations."

892. *Bardon v. Northern Pacific*, 145 U. S. 535 (Justice Field).

In this case a citizen had pre-empted the land, which was an odd numbered section within the primary limits of the grant, before the line of the road was located, and the pre-emption claim was uncanceled at the time of the grant. The pre-emption claim was cancelled after the map of definite location of the road had been filed, and the court says:

"The cancellation only brought it within the category of public lands in reference to future legislation. This, we think, has long been the settled doctrine of this court."

Then the court cites *Wilcox v. Jackson*, 13 Pt. 498, 513, saying that in that case:

"This court held that wherever a tract of land has been legally appropriated to any purpose, from that moment it becomes severed from the mass of public lands, and no subsequent law, or proclamation, or sale will be construed to embrace it, or to operate upon it, although no reservation of it be

made. The validity and effect of the appropriation do not depend upon its not being subjected afterwards to cancellation because of the omission of some particular duty of the party claiming its benefits."

Cites *Hastings & R. R. Co. v. Whitney*, 132 U. S. 357, and *Leavenworth & R. R. Co. v. U. S.* 92, U. S. 733, to the point that land appropriated prior to the time the grant would otherwise attach, would not pass under the grant, although it subsequently became public land.

Then after citing and quoting the *Dunmeyer* case to the point that lands to which prior claim had attached do not come with these grants after the cancellation of such prior claims, Justice Field continues:

"Not only does the land once reserved not fall under the grant should the reservation afterwards for any cause be removed, *but it does not then become a source of indemnity for deficiencies in the place limit.* Such deficiencies can only be supplied from lands within limits designated by the granting act or other law of Congress. The land covered by the pre-emption entry being thereby excepted from the grant to the Northern Pacific Railway Company was also excepted from the withdrawals from sale or pre-emption of public lands for its benefit."

This case also holds:

"The cancellation, as already said, did not have the effect of bringing the land under the operation of the grant to the Northern Pacific Railway Company; it simply restored the lands to the mass of public lands to be dealt with subsequently in the same manner as any other public lands of the United States not covered by or excepted from the grant."

The provisions for selection of indemnity lands are identical in the Northern Pacific and the Southern Pacific grants, with the single exception that the Southern Pacific grant requires lands in lieu of mineral lands found within the primary limits to be selected *within twenty miles* of the road. It is a part of the history of the Southern Pacific grant that when the bill went to the committee on public lands in the house of representatives it provided that lands in lieu of mineral lands should be selected within *fifty miles* of the road, but that committee reported the bill back amended by striking out the word "*fifty*" and inserting in lieu thereof the word "*twenty*," and the bill so amended became a law.

It will be noticed that the reason given by the court, in the cases last above cited, for not allowing the railroads to claim, under these grants, lands to which a claim or right had attached prior to the filing of the map of definite location was, that to allow it would be to put these great corporations in position to contest the rights of settlers to acquire the land and to give the railroad companies an incentive to come between the settlers and the government and defeat the settlers' claims to the land. Therefore it was held that Congress intended to remove all possibility of such contests by excepting from the operations of the statute all lands to which any right had attached prior to the filing of the map of definite location; and thereby to deprive these companies of both incentive and power to claim, under the grant, any such lands. Under these decisions it makes no difference if the prior claims were cancelled; even then the railroad company could not claim the land. The lieu selections are subject

to the same limitations as the primary selections with the single exception that they must be made within the lieu limits of the grant.

These reasons given for these decisions by the Supreme Court apply with equal force to primary and indemnity selections. If the company had a right to acquire, as lieu lands, those lands which are within the primary limits of the grant and which it could not acquire as granted, because they had been claimed by settlers before the road was definitely located, then all the reasoning of the court in the cases last cited is at fault and is futile and vain; because by selecting the lands as lieu lands they could force the settler to a contest in the Land Department or in the proper courts to determine whether the land was public land, whether the settler had complied with the law, whether he had abandoned his claim, and whether, in case his claim had been cancelled, the cancellation was lawful, and could contest his right to have his claim to the land reinstated by the government officers. This would allow the railroad company to step between the settler and the government. The court has decided that it was the purpose of the statute to prevent this very thing, and therefore if the court's construction of the statute is correct it is clear that the railroad company never had, under this granting act, any right to select, in lieu of mineral lands, those lands within the primary limits of the grant to which claims had attached before the road was definitely located although such prior claims were cancelled before such lieu selections were made. This being true, there is no possible escape from the conclusion that the primary limits of the grant are ten miles from the line of the road and

that the lieu limits of the grant are twenty miles from the road. This must be true because lieu lands are, under the express terms of the statute, to be selected within twenty miles of the road and not more than ten miles beyond the primary limits. The act contemplates lieu selections for mineral lands which are excluded from the granted land, and the only way they can be selected within twenty miles of the line of the road is by limiting the grant to land "to the amount of * * * ten sections per mile," which is the language of the statute, when the road is built within a state.

THE CERTIFICATION OF THE LANDS IN CONTROVERSY FOR PATENT AND THE PATENTING THEREOF ARE VOID AB INITIO BECAUSE THE LANDS WERE CERTIFIED FOR PATENT AND PATENTED WITHOUT AUTHORITY OF LAW AND IN VIOLATION OF THE ACTS OF CONGRESS.

The fourth section of the granting act and the joint resolution of June 28, 1870, both specify that patent shall issue only for land opposite to and coterminous with each completed section of twenty-five consecutive miles of road constructed. This leaves no possible room for inference that the Secretary of the Interior had authority to cause patents to issue for lands opposite to and coterminous with any section of less than 25 consecutive miles of road constructed until the entire road should be completed.

The cross bill alleges that all of the land in controversy lies opposite to and coterminous with an uncompleted section of 25 consecutive miles of the road, and that the road contemplated in the granting act has never been completed. [R. 128.] The cross bill also sets up a copy

of the application made by the railroad company for patent to these lands, which application expressly shows that the lands applied for are opposite to and coterminous with 40.559 miles of road constructed. [R. 120.] This embraces one section of 25 consecutive miles of road and 15.559 miles of another section. The 15.559 miles of the road were the last miles constructed by the railroad company, and all the land here in controversy lie opposite to and coterminous with them. [R. 128.] The Supreme Court has decided that under such circumstances there was no authority of law for the issuance of a patent for these lands.

Sioux City & St. Paul Railroad Company v. U. S.,
159 U. S. 349.

In this case the United States sued to recover lands which had been granted to the state of Iowa by Act of Congress approved May 12, 1864, to aid in the construction of railroads within that state. (13 Stat. 72.) The act provided that

“When the governor of said state shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner as a first-class railroad, then the Secretary of the Interior shall issue to the state patents for one hundred sections of land for the benefit of the road having completed ten consecutive miles as aforesaid. When the governor of said state shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said state in like manner for a like number, and when certificates of the completion of additional section of ten consecutive miles of either of said roads are, from time to time, made as aforesaid, additional sections of land

shall be patented as aforesaid, until said roads, or either of them, are completed, when the whole of the land hereby granted shall be patented to the state for the uses aforesaid and none other.”

The railroad company began construction of this road in 1872 at the Minnesota line and completed it southward in the direction of Sioux City for a distance of 56.13 miles. The railroad company claimed that it was entitled to land for the whole 56.13 miles of road constructed, that is for the five sections of ten consecutive miles each, and for the 6.13 miles of another section of ten consecutive miles. The Supreme Court held that the railroad company was not entitled to any land for the construction of the 6.13 miles of road. The court said:

“The company also contends that it was entitled to lands for the whole number of miles of road actually constructed by it, that is, for the fifty miles certified by the governor to have been completed, and also for the fraction of six miles and a quarter immediately north of Le Mars, which was never certified to the Secretary of the Interior. We cannot assent to this construction of the Act of Congress. Congress evidently had in view the construction of an entire road from Sioux City to the Minnesota state line. And to that end the first section of the Act of 1864 grants to the state every alternate section of land designated by odd numbers for ten sections in width on each side of the road. But that section must be taken in connection with the fourth section prescribing the mode in which the grant shall be administered. By the latter section it is provided that the state shall not dispose of the lands granted, except for the purposes indicated by Congress, *and in the manner* prescribed; further, that ‘said lands shall not in any manner be disposed of or encumbered except as the same are patented under the provisions of this act.’ Now, the manner prescribed for disposing of the lands granted was

that patent should be issued to the state for 100 sections of land for each section of ten consecutive miles, when the governor certified to the completion of such section in good, substantial and workman-like manner as a first-class railroad. This was evidently the interpretation given by the state to the Act of Congress, for the governor never certified to the construction of any section of road less than ten consecutive miles in length. * * *

“But the time never came when the state could rightfully demand patents for the whole of the lands granted. The road was never completed, and, therefore, patents could not be legally issued except for 100 sections of land for each section of ten consecutive miles of road, certified by the governor of the state to have been constructed in the mode required by Congress. The result of this view is that the Secretary of the Interior was without authority to issue patent, except for the five sections of ten consecutive miles each, that is, for fifty miles of constructed road certified by the governor of the state. The state could not, without completing the road, or causing it to be completed, demand patents on account of the construction of less than a section of ten consecutive miles. This was the view taken by Secretary Lamar, who said that ‘a careful consideration of the granting act convinces me that there is no authority of law for patenting any land on account of the six and a quarter miles of road (immediately north of Le Mars), and that no lands had been earned by the construction thereof. 6 Land Dec. 51.’”

The appellees in this case are not in as good position as the Sioux City road was because its patent issued after the Act of March 3, 1887, providing for the adjustments of railroad land grants was passed, and the seventh section of that statute positively forbids the certification or patenting the lands contained in any list for the benefit of a railroad company if such certification and patenting

creates an excess of land over the amount due to be patented. The application of the Southern Pacific Railroad Company for patent of these lands showed that they were claiming in their list lands for 15.559 miles of road for the construction of which they were entitled to no land, therefore the Secretary of the Interior was forbidden to certify the lands contained in the list or to cause patent therefor to issue.

It follows from these observations that the patent and the certification of the land were both void *ab initio*.

IF THE PATENT WAS, AT THE DATE OF ITS ISSUE VOID OR VOIDABLE, FOR ANY REASON, AND HAS BEEN VALIDATED OR CONFIRMED BY ACTS OF CONGRESS, IT HAS BEEN VALIDATED OR CONFIRMED AS A WHOLE AND ITS MINERAL EXCEPTION CLAUSE IS EFFECTIVE TO EXCLUDE MINERAL LANDS FROM ITS CONVEYANCE.

Appellees set up the Act of Congress of March 2, 1896, 29 Stat. 42, and in the court below relied upon the case of the United States v. Chandler-Dunbar Company, 209 U. S. 447, quoting:

“In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to effect the right, even if in terms only directed against the remedy. *Lef-fingwell v. Warren*, 2 Black 599, 605; *Sharon v. Tucker*, 144 U. S. 533; *Davis v. Mills*, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See *United States v. Winona & St. Peter R. R. Co.*, 165 U. S. 476.”

The language of the opinion in the Dunbar case leaves some room for doubt of the author's meaning as to whether the statute is held, in case of a *void* patent, to create a new grant in the terms of the patent. If it does so hold, we venture the assertion that no other case like it can be found. We believe that the opinion in that case holds that the patent was *voidable* and not *void*, and that it was not the intention of Congress by virtue of any statute of limitations to render a *void* patent valid, but only to cure the defects of *voidable* patents after the expiration of the time limited by the act in case suit to annul the patent was not brought during that period.

Section 8 of the Act of March 3rd, 1891, provides that suits by the United States to vacate and annul any patent theretofore issued shall only be brought within five years from the passage of that act, and that suits to vacate and annul patents thereafter issued shall only be brought within six years after the date of the issuance of such patents.

Section 1 of the Act of March 2, 1896, provides that suits by the United States to vacate and annul any patent to lands theretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of that act, and that suits to vacate and annul patents thereafter issued shall only be brought within six years after the issuance of such patents, and extends accordingly the limitations of the act of March 3rd, 1891, "as to the patents herein referred to."

This act also provides that no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled,

and confirms the right and title of such purchaser. It has no repealing clause.

Assuming that all the patents “erroneously issued” are voidable, and that none of them are void, and assuming also that the act of March 3rd, 1891, would, after the period of its limitation had expired, make a void patent, as well as a voidable patent, good, and, in the case of a void patent, amount to a new grant, what is the effect of these two statutes on a void patent issued under a railroad grant July 10th, 1894?

From these premises it is clear the act of March 2nd, 1896, has reference only to suits by the United States to vacate and annul voidable patents issued under railroad and wagon road grants. It limits the periods in which suits to void such patents may be brought. It left the act of March 3rd, 1891, to limit the periods within which suits by the United States to vacate and annul patents issued under any law other than a railroad or wagon road grant, might be brought. As all patents “erroneously issued” are voidable and not void, and if the case of *United States v. Chandler-Dunbar Co.*, 209 U. S. 447, holds that the statute of March 3rd, 1891, has the effect of validating a void patent against the United States after the period of its limitation has expired, without suit being brought by the United States to vacate or annul it, we are forced to the conclusion that in passing the Act of March 2nd, 1896, Congress intended to accomplish one of two things, namely:

1st. To extend the time in which the United States might sue to avoid a voidable patent, and intended by the same act to let the statute of March 3rd, 1891, validate on the next day a patent which was at the passage of the

Act of March 2nd, 1896, void; or,

2nd. Intended to remove from the operation of the statute of March 3rd, 1891, all imperfect patents, both void and voidable, at any time issued under a railroad or wagon road grant, and allow further time in which to make void by proper suits such of them as were voidable, and leave void such of them as were already void, and not allow the act of March 3rd, 1891, the next day to convert void patents into valid patents, and thus place it beyond the power of the government to do the very thing which the statute of March 2nd, 1896, purports to enable it to do, namely, keep what justly belonged to it.

The only means of escaping from one of these conclusions is to say that Congress never intended that the limitations of either of these statutes should ever apply in any way to void patents, or to state it differently, that Congress did not intend by the passage of either of these acts to make it necessary for the United States to bring suit to make a void patent void in order to get back to itself its own title, which had never passed from it.

In order to arrive at such conclusions, we must say that in the Dunbar case, Justice Holmes, when he speaks of the patent there in question as a void patent, meant that it was voidable, and would be void after the courts declared it to be so. He says:

“It is said that the instrument was void and hence no patent, but the statute presupposes an instrument that might be declared void. When it refers to ‘any patent heretofore issued,’ it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents, it would be almost, if not quite, without use.”

The “source of the document” is the same, whether it be void or voidable. In mentioning “valid patents” in contradistinction to void patents, the language of the opinion is open to the inference that its writer considered all patents as falling within one of two classes, void or valid, and that there was in his mind at the time no distinction between a void and a voidable patent.

It also appears from the facts set forth in this opinion, that the patent under consideration was held by the court never to have been void. That case arose upon a bill in equity by the United States to remove a cloud upon its alleged title to two islands in the Sault Ste. Marie. The islands, it is said, were but little more than rocks rising slightly above the surface of the water, and stood a short distance from a portion of the shore lying between the ship canal and the rapids. These islands were patented to the defendant by the United States on December 15th, 1883, and the suit to quiet title was heard in the United States Supreme Court at the October term, 1907. It was alleged and admitted by the bill that the bed of the river or strait Sault Ste. Marie passed to the state of Michigan on the 23rd day of June, 1836, and the court, after quoting from the statutes relative to the admission of that state, to the effect that it had no power “to interfere with the sale by the United States and under their authority, of the vacant and unsold lands within the limits of said state,” and that said state should “never interfere with the primary disposal of the soil within the same by the United States,” the court says:

“We cannot think that these provisions excepted such lands from the admitted transfer to the state of the bed of the streams surrounding them. If

they do not, then, whether the title remains in the state or passed to the defendant with the land conveyed by the patent, the bill must fail.”

The court then distinctly holds that the patent to the defendant and the laws of Michigan, taken together, operate to transfer the title of the land to the defendant, for the reason that the state had the right to grant lands covered by tidewaters or navigable lakes,

“when that can be done without substantial impairment of the interests of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as it may be necessary for the regulation of commerce; but it cannot be pretended that private ownership of the bed of the stream or of the islands, subject to the public rights, will impair the interests of the public in the waters of the Sault Ste. Marie.”

Under the facts of this case it is difficult to understand how a patent which is admitted to have passed title of the islands “subject to the public rights” for the regulation of commerce, can be said to have been void when such private ownership of the islands is distinctly held not to impair the interests of the public in the waters of the Sault Ste. Marie. If it did impair those interests, such impairment would only render the patent voidable.

The opinion in that case, read as a whole, is not an authority for the proposition that a statute of limitation of suit operates to make valid a patent which is *void* because suit is not instituted to render it *void*. If it was void *ab initio* the judgment of a court could not render it more void than it was before the judgment. If the statute can render a void patent valid it could render valid one which had been rendered void by judgment of a

court, and it would be necessary to keep bringing actions every six years to keep the patent void.

What do the courts mean by saying that, after the limitation of the statute has expired a document must be held to be valid or “good,” although it might have been rendered a nullity by proper proceedings instituted before the time limited for bringing suit expired? It cannot be claimed that the document becomes valid because of any change wrought by the statute of limitations in the substantive law from which its infirmities arose. It becomes “good” because the statute renders it impossible for anyone to contradict what appears or purports to have been done by it. The statute simply says that if the import of the document is contrary to the rights of any person, he may have it declared void by proper proceedings instituted within the time limited by the statute; and that if such proceedings are not brought within that time they cannot be brought thereafter. Such statutes do not alter the terms, import of conditions of any conveyance or any document; they do not change the nature or the extent of the estate which the document purports to grant or pass title to. They only make “good” the document as written. The very aim and purpose of such statutes is to forbid and prevent litigants from claiming that records of land titles do not mean what they say or that they are not effective according to their terms and import as written, unless they are altered by proper proceedings within a specified time. The aim of such statutes is so to settle the records of title that a perusal of them would inform every man of his rights in regard to the property to which they relate. Such are

the reasons given in all the cases for the existence, the construction and the application of all such statutes, and from this it necessarily follows that even if the exception of mineral land by appropriate language in the patent was, when made, unauthorized and improperly inserted, the fact remains that it is still there and is a part of appellees' title and cannot now be changed, and is by confirmation of the statute valid according to its import and is effective to keep mineral lands excluded from the operation of the grant; and this is true, the statute of limitations, if applicable, having run, whether, at the date of the patent, it was valid, void or voidable.

It is respectfully submitted that the judgment and decree of the court below should be reversed.

E. J. BLANDIN and

D. J. HINKLEY,

Solicitors for Appellants.

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

J. I. LAMPRECHT and F. M. AIKEN, Trustees,
Appellants,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY
and KERN TRADING AND OIL COMPANY,
et al.,

Appellees.

In Equity
No. 2028

BRIEF FOR APPELLEES

Southern Pacific Railroad Company and
Kern Trading and Oil Company

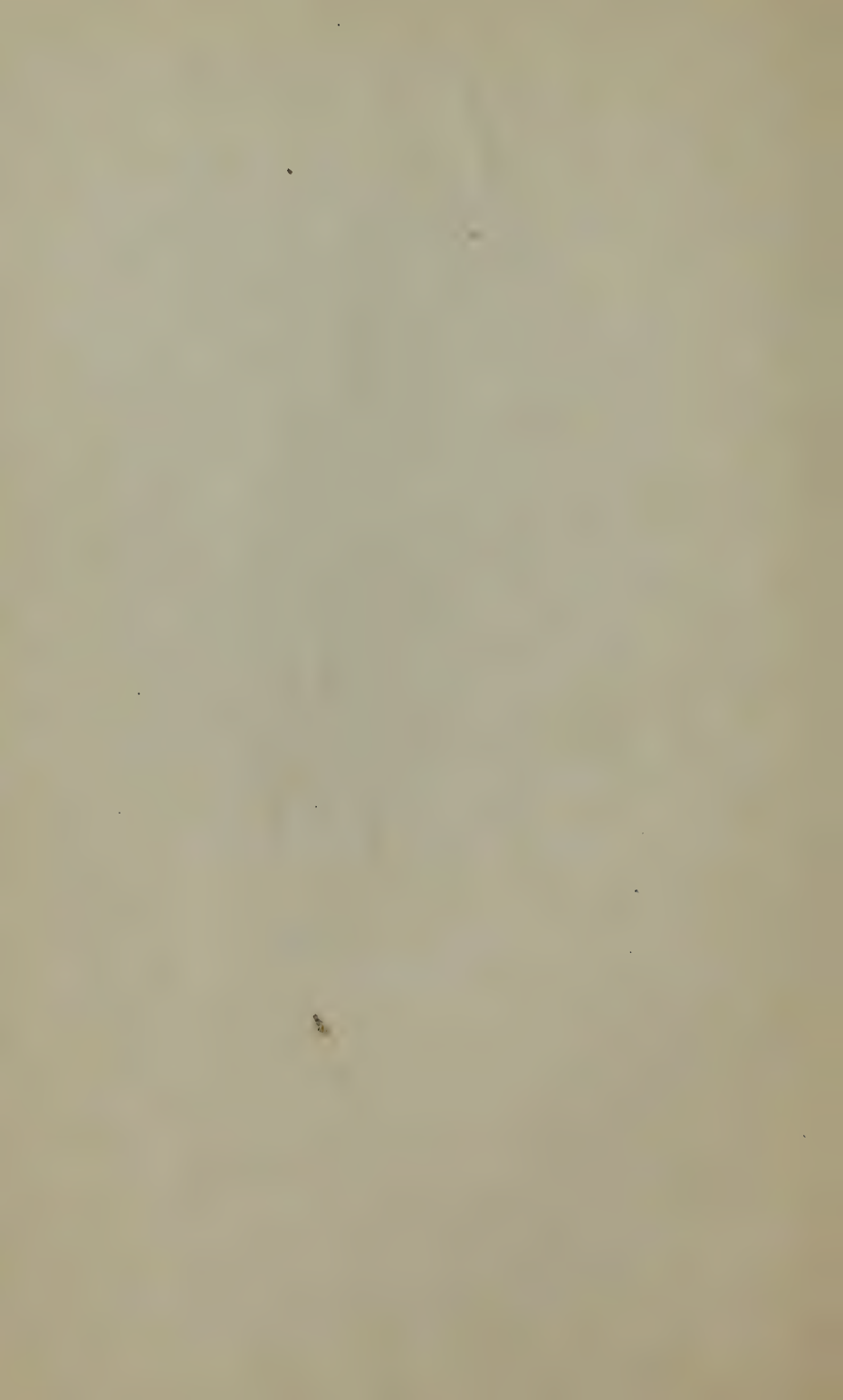
GUY V. SHOUP AND D. V. COWDEN,
Attorneys for S. P. R. R. Co. and Kern T. & O. Co.

WM. SINGER, JR.,
Of Counsel for S. P. R. R. Co. and Kern T. & O. Co.

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By
Deputy Clerk.



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STATEMENT OF THE CASE.

This case has been set for argument on the same date as the case of *Burke v. Southern Pacific Railroad Company et al.*, No. 1981, for the reason that both appeals involve the same land, virtually the same parties, and are dependent upon the same legal principles; in fact, the plaintiffs in this case appear as trustees to represent persons who were joined with Burke in the attempted location of the land in suit as mining claims fifteen years after the patent at bar had issued to the defendant railroad company.

Why they should appear as crosscomplainants instead of joining as plaintiffs in the suit of *Edmund Burke v. Southern Pacific Railroad Company* is not apparent; but in order to have this entire matter disposed of in one judgment as speedily as practicable, no technical objection has been urged by the defendants to the cross bill.

The cross bill is virtually a copy of the bill of complaint filed by Edmund Burke, with slight changes of

arrangement, but identical in substance. And in the court below the legal arguments presented by Mr. Burke and by counsel for crosscomplainants were alike; and the demurrer to the cross bill was sustained on the same grounds as in the Burke and Roberts cases.

It has therefore been thought advisable to submit by reference the brief filed in this Court by defendants in the Burke case (No. 1981) as their brief on this appeal; as it is thought that no useful purpose would be subserved by repeating herein the statement of the facts and of defendants' points and authorities set forth in the brief filed in the Burke appeal.

For defendants' statement of the case and points and authorities the Court is, therefore, respectfully referred to the brief filed by defendants in the case of *Edmund Burke vs. Southern Pacific Railroad Company et al.*, No. 1981. It is desired in this brief merely to comment briefly in reply to some of the arguments and authorities made use of by the crosscomplainants.

Argument

It may be observed at the outset that crosscomplainants have fallen into the same errors committed by complainant Edmund Burke, in assuming that they could locate mining claims on patented land years after

patent issued, of confounding this collateral attack with a direct attack upon a patent by one having an interest in the land involved at the time the patent issued, and by assuming that the demurrer of defendants admits all matters alleged in the cross bill irrespective of whether they were well pleaded or relevant or material. Allegations relating to things done prior to the patent are not issuable allegations in a collateral attack upon a patent and are consequently not admitted by demurrer, nor can a presumption which is deemed conclusive be overcome in such manner. This is elementary, as will be seen by an examination of the authorities cited by defendants in the Burke case. And it will be observed that the arguments relied upon by them are applicable only to cases of direct attacks upon patents by persons having rights in the land prior to the patent's issuance.

I.

The patent at bar is conclusive upon collateral attack that the defendant railroad company has title to the land embraced by the patent, for it is the final action of the Land Department conveying and confirming the railroad company's title, and could not have been properly issued unless all official duties prior to its issuance had been carried out.

This has been fully covered by defendants' brief in the Burke case, and the Court is respectfully referred to

that brief, as it is desired to make this brief as short as possible. Crosscomplainants' brief does not differ in the ultimate arguments advanced from the brief filed by Edmund Burke; and it is desired in this brief merely to call attention to the contention that a railroad patent is to be given a different effect from one issued under other grants or acts of Congress. The attempted distinctions, inaccurate and unsubstantial, are a practical concession by counsel that the law is overwhelmingly with the defendants in this case.

The substance of crosscomplainants' argument from pages 19-60, is that a railroad company can only acquire mineral land through an adjudication by the Land Department that the land is of the character contemplated by the grant; and that the patent at bar is not an adjudication of that fact because it does not on its face, in terms, state that the Land Department has determined the question of the land's character and does not further state that the land is non-mineral in character.

Before entering upon the argument of that proposition, counsel argue, pages 19-21, that the mining locations alleged to have been made upon the ground at some uncertain date prior to patenting the land excepted the land from the grant. Under points and contentions, subdivision (5), of defendants' brief in the Burke case, all questions appertaining to those alleged locations will be found fully discussed, and the futility

of such allegations and arguments in case of collateral attack by a stranger to the title established. Cross-complainants in such a case do not strengthen their position by alleging wrongs to others who, it is significant, have made no complaint on their own behalf for seventeen years.

It may be conceded, as argued by crosscomplainants at p. 21, that public officers must do their duty and not transcend their powers, but it is equally true that the Land Department has jurisdiction to decide all claims respecting public lands and to issue patents therefor, and it is not apparent in the case at bar how they have transcended their powers through patenting land that some one at some earlier date had plastered with speculative mining locations. In fact, if the locations had been valid and the land known to be valuable for mineral when the patent issued, it would only be an instance of erroneous conclusion in a case where the Land Department had full jurisdiction; and one that could be corrected in a direct suit for that purpose by the party wronged. It is only in cases of absence of jurisdiction to act at all that the acts of public officials are nullities, and crosscomplainants are citing instances of wrong conclusions, not of absence of power. The cases cited at p. 21 of crosscomplainants' brief are not remotely in point, but the courts have time and again elaborately discussed the contention of counsel, in connection with

the Land Department, and resolved it against their views. As pointed out in defendants' brief in the Burke case, mining claims of record in the Land Department prior to definite location of the road were excepted out of the grant irrespective of their validity, but claims located after the definite location of the road must be passed upon by the Land Department either in patenting the land to the mineral claimants or in patenting it to the railroad company; in other words, the Land Department had full jurisdiction over the land embraced in such claim.

It is conceded, at p. 21 of crosscomplainants' brief that if the Land Department determined the character of the lands and issued patent therefor to the railroad company, the railroad company would be entitled to the land irrespective of its character; but it is argued that they did not decide the land's character in this instance; to which defendants reply that the patent is the unanswerable evidence on collateral attack that the railroad company is the absolute owner of the patented lands, and, as determination of the land's character is a prerequisite of that patent, conclusive of that fact also. In support of their argument, for the purpose of evading the solid wall of decisions supporting defendants' position, crosscomplainants' counsel, between pages 21 and 26, argue that the railroad act is a special act not governed by general laws, and that therefore the rules

applied by the courts to patents issued, and certifications made, under other grants and statutes cannot be applied to railroad patents. If the statutes themselves had defined the effect of the patents and certifications under the different statutes referred to, there might be excuse for the space used in discussing the superseding of special statutes by general ones or *vice versa*; but the *judicial law* in interpreting all of these statutes has said what the effect of patents and certifications shall be because their purpose is to transfer the government title for all time. At page 22, counsel has the following to say of patents issued under other grants and laws:

“General statutes for the conveyance of public lands provide that the officers of the Interior Department shall convey lands of specified character to individuals having specified qualifications upon satisfactory proof of performance by the applicants of specified duties. In such cases a decision by the officers of the Interior Department that the applicant has the proper qualifications, and has performed the duties which entitle him to the land, and that the land is of the character for which patent is authorized by the statute, is in each instance necessarily pre-requisite to the grant, which is made by the patent, and which such general statutes provide shall be unconditional when made.”

And there can be no question but that the same duties are imposed on the Land Department in issuing railroad patents. If there were anything in counsel's contention,

what should be said of the Baca Grant under consideration in *Shaw v. Kellogg*, 170 U. S. 312, a grant in all its essentials like the indemnity portion of the railroad grant? And it could not be seriously contended that Congress intended different effect to be given to railroad place land patents from that to be given to railroad indemnity land patents.

Just why counsel devote so much attention between pages 26 and 31 of their brief to explaining that the *Tarpey*, *Price County*, and other cases cited at page 26-31 held that railroad grants were grants *in praesenti*, passing title as of the date of the grant, is not clear; it is not disputed that mineral land is excluded from the grant at the date of definite location, whether discovered or not at that time, but there can be no doubt either as to the proposition that the patent when issued to the railroad company is, in the language of the granting act, a conveyance and confirmance of title. There is no inconsistency in the two rules; for even as to land which is admittedly agricultural in character at the time of the filing of the map of definite location, the title which vests in the railroad company at the time of the filing of such map is not a complete title in fee simple, but a title which may be defeated, not only by failure to comply with the conditions of the granting act, such as for instance, the condition requiring construction of the road, but is also subject to be defeated by the dis-

covery of mineral thereon sufficient in quantity to render it more valuable for mining than agricultural purposes prior to the issuance of patent. This is true of the entire land grant, for mineral might be discovered upon every portion of it between the time of the filing of the map of definite route and the time of the issuance of patent. As to such land, the patent releases all claim of the Government and passes and confirms a complete fee simple title. As to land in fact mineral, the title does not attach as of the date of definite location of the route, nor at any time subsequent, unless and until the Land Department issues its patent therefor to the railroad company. In such event the legal title passes by the patent, not because of the character of the land, but because the question as to the character of the land was for the Department to determine and because the patent in such case carries with it the presumption that the land is agricultural in character. The legal title thus passed by the patent cannot be defeated by any subsequent discovery of mineral (*Shaw v. Kellogg*, 170 U. S. 312); but if the land was actually known to be mineral prior to the issuance of such patent, the Government may, in a suit brought within the statutory period, have such legal title restored to it upon proper pleadings and proofs, or such legal title may be declared to have been held in trust by the company for any other person who at the time of the issuance of such patent was in such privity with the Government

as that he would have been entitled to patent himself had it not been for the erroneous issuance of patent to the railroad company.

It has just been stated that the patent when issued to the railroad company carries with it the presumption that the land is agricultural in character. This presumption is only *prima facie* and may be overcome by proof in a direct attack by the Government or one in privity with the Government where the patent was issued upon an ex parte hearing without contest and without an actual trial. It is, however, conclusive as against one whose rights had not been initiated until after the patent issued, in other words, as against one who is attempting to collaterally assail the patent; and it is also conclusive even upon direct attack, if the issuance of such patent was the result of a trial before the Department of the Interior to which the person who claims to be aggrieved was a party and who either did or had the opportunity to introduce evidence concerning any disputed questions of fact. In such a case, the decision of the Department upon all questions of fact is conclusive, and it is only when the party aggrieved can establish that the Department of the Interior erred in its conclusions of law upon the facts found by it, that he will be entitled to any relief in any other tribunal.

But there is nothing to be gained by an exhaustive discussion of the respective rules of the Tarpey and Barden cases, for it is settled beyond question that after patent the railroad company acquires a conclusive title, when collaterally assailed, to any mineral land that by chance may be embraced by the patent. Counsel has gone laboriously into this discussion to try to show that a railroad patent differs from other patents and certifications of public lands, conceding, however, at the same time and arguing that in both instances the Land Department must decide the land's character and that when that has been done the patent is in either instance conclusive. And the trend of counsel's argument, pages 31-55, is to the effect that because of the matters heretofore discussed, there must be a different kind of adjudication in the case of railroad patents from that in the case of other patents.

It may be conceded that in the case of railroad patents, as in the case of other patents or of certifications, if the Land Department in any respect does not do its duty in patenting land, the Government or one with disregarded vested rights existing when the patent issued, in the proper manner and within the proper time, may in a court of equity have whatever injustice or wrong that may have been entailed by the neglect righted; but there can be no question, in the light of the decisions, but that a third party cannot speculate

upon such possible wrongs and force the patentee to exhibit the record back of the patent and furnish proof that the public officials did their full duty and committed no error. Yet that is what crosscomplainants are seeking to do in this case.

Nor can there be any question but that the patent itself, or the certification as the case may be, is the judgment or the sole record on collateral attack. Nor is it true, as contended at p. 31, that the demurrer admits that the land is mineral in character, for that is not a proper, relevant, or material allegation in a collateral attack on a patent. But it is contended that, having by demurrer admitted the land to be mineral in character, defendants (p. 32) must show that the officers of the Land Department made an erroneous decision in patenting the land to defendant railroad company, which is merely another way of saying that the Interior Department must decide the character of the land. To which the same answer applies—that the patent is the conclusive evidence of title, and of decision and of any other prerequisite to its issuance when collaterally assailed. By what right do crosscomplainants, speculating on a supposed defect in title, say, “prove affirmatively every step taken in the issuance of your title or we will take the land away from you seventeen years after you acquired it”?

And counsel then proceed, between pages 33 and 44, to try to show that the United States Supreme Court in deciding the Barden case was deeply concerned with the distinction between courts of "superior" and "inferior" jurisdiction, and that most of the discussion in that case relating to patents proceeded from a refined and subtle knowledge of that distinction which the court was at great pains to inviolably preserve. If such were the court's concern it succeeded in keeping it well concealed from the writer of the minority opinion, who reviewed and criticized the majority opinion with much thoroughness; nor, as indicated by the argument advanced by Government counsel, were the government attorneys aware of such distinction, or concerned in its preservation.

The majority opinion in the Barden case cited and followed without reserve the prior decisions, relied upon by defendants in this case, on the inviolability collaterally of patents issued under other acts and statutes; and the courts have subsequently without hesitancy applied the Barden case in holding patents and certifications under other acts and grants conclusive collaterally. This should be sufficient answer to counsel's contentions, that the court intended to hold in that case that a railroad patent was to be any different or have any different effect from any other patent or certification finally passing the Government title.

The vice of the argument is due to the selection of expressions without regard to a consideration of the entire case. This is an error often fallen into in considering the Barden case. Counsel in *Shaw v. Kellogg*, 170 U. S. 312, attempted to make similar use of expressions from that case and the Supreme Court then took occasion to state the issues in that case, and effect to be given to it, as follows:

“Defendant relies largely on the decision of this court in *Barden v. Northern Pacific Railroad*, 154 U. S. 288, in which it was held that lands identified by the filing of the map of definite location as within the scope of the grant made by Congress to that company, although at the time of the filing of such map not known to contain any mineral, did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is true there was a division of opinion, but that division was only as to the time at which and the means by which the non-mineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be “construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United states,” held that the question of mineral or non-mineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass—and it passed

unquestionably by the patent—it passed free from the contingency of future discovery of minerals.”

Which does not accord with counsel’s views at p. 35 of the brief.

In short, the Barden case does not purport to do other than hold that the Land Department must determine the character of the land, and that its patent will be conclusive on that point. To argue that it must make express findings and state in the patent that the land is non-mineral is to argue that it must do superfluous acts. There is no more reason why it should do so here than in other acts relating to public lands, where, according to counsel’s argument the Land Department is also an “inferior” tribunal, yet in such cases counsel concede the mere patent to be conclusive.

And so again, at p. 44, counsel select an extract from the opinion in the Barden case and seek to give it an interpretation that would make the rest of the opinion meaningless; for if the officers of the Government must determine the land’s character, how can it be successfully argued that they could avoid doing so by putting a general exception and qualification in the patent? *Shaw v. Kellogg*, 170 U. S. 312, and many other cases are decisive against that interpretation.

And counsel argue further (pp. 44-45), in support of this contention, that if the record did not, and the

patent did not show findings and an expression of the land's character, there would be no way of correcting errors in Land Department decisions. That argument is without support: first, the Government may within the statutory period correct any error by direct suit, either to protect itself or a third person entitled to the land; second, an individual can in direct suit, where his rights have been disregarded do likewise; third, such an individual after contest may have corrected in the courts the Land Department's application of the law to the contested facts, or may attack on any ground upon which a judgment may be attacked in equity; fourth, anyone can attack an absolutely void act. Thus all errors of law in such instances may be corrected; and on *direct* attack the proceedings back of the patent searched for fraud or error.

The jurisdiction of the Land Department in the case at bar appears clearly in the patent, and no erroneous exercise of it appears; but if it did it would take a direct suit by the proper party to correct it. And here again (p. 46-47) counsel overlook the distinction between direct and collateral attack in cases of this character, for it is on direct attack that one after contest in the Land Department may show that the Land Department drew erroneous legal conclusions. And this is followed up by the statement that the demurrer admits the allegation of the cross bill that there was

no adjudication, a matter which for reasons heretofore discussed is not material, proper, relevant, or well pleaded and not admitted by demurrer.

It may be repeated in concluding this branch of the discussion that the patent is the conclusive evidence, record or judgment of title when collaterally assailed, and the attempt of the officers of the Land Department to attempt to qualify the absolute title provided for by the granting act was wholly beyond their power and ineffective for any purpose.

This conclusive effect of the patent is not, as counsel states at p. 54 of the brief, based upon the presumption that the patent does not affirmatively show that the land was adjudged non-mineral, but upon the law that the patent itself is the affirmative judgment of that fact; and the conclusive judgment of that fact when collaterally assailed. And counsel, as repeatedly pointed out, overlook the fact that direct proceedings are provided for the correction of the multitude of imaginary evils outlined by counsel between pages 54 and 60. It may not be amiss at this juncture, however, to remark that the courts have been busy for many years in discussing public land questions and so far the reports fail to disclose where any encouragement has been given to one seeking to speculate on alleged flaws in another's title, although the decisions afford ample protection for one whose rights have been disregarded. As a matter

of fact, if this were a direct suit and the matter material, it would not be difficult to show that the character of the land was determined in this case as in all other cases relating to public lands where the patent is not contested, and the exception put in this particular patent as a matter of routine.

Counsel, at p. 57, again overlooking the distinction between questions of direct and collateral attack, argue that while the Land Department's decisions on questions of fact are conclusive, its decisions on matters of law are not. But that has no application on collateral attack, unless it appears as a matter of law that the Land Department had no jurisdiction over the subject matter. Upon collateral attack the patent shows *prima facie* jurisdiction, that is, that the land is within the limits of the grant and the grant upon which the patent is based. The expression, "conclusive upon the facts but not upon the law", is found in cases of direct attack by parties contesting a patent before the Land Department; and mean that in those cases the Land Department, acting as a quasi-judicial tribunal, has conclusive authority to settle the facts, but if it apply the wrong law the courts will correct it on direct suit. But the ordinary patent, issued without contest, is conclusive collaterally as well for the reason that the quasi-judicial tribunal must have resolved all questions of fact that it was its duty to settle before issuing the patent, as for

the reason that it is the final expression of public officials who are conclusively presumed to have done their duty.

These matters have all received full discussion by the courts in a great many decisions, and a reference to them, particularly those discussing void and voidable patents, and cited in defendants' brief in the Burke case, will show when a patent is void and may be collaterally assailed, and when it is voidable and the proceedings back of it can be examined only on direct suit to show that fact. Counsel have not presented any decision in support of their argument upon this point, and an examination of the decisions will show that they hold decisively against counsel's arguments.

Under any consideration the question of the land's character is one of fact, and the only error that could be attributed even under the improperly pleaded allegations of the crosscomplaint, would be either that they were mistaken as to the land's real character, or that they did not do their full duty in the premises, neither of which questions can be examined into collaterally.

II.

The discussion of *Shaw v. Kellogg*, 170 U. S. 312, and *Cowell v. Lammers*, 21 F. 200, between pages 60 and 76 is along the lines followed in the brief filed by Edmund Burke, and the distinctions sought to be made have been shown in defendants' brief in the Burke case to be

unsound. The Court is respectfully referred to that brief for the reply to counsels' argument in connection with those cases. And the same may be said of the consideration between pages 76 and 81 of the California decisions relative to the exception in the patent and of the Joint Resolution of June 28th 1870.

III.

Pages 81-94 of the brief of crosscomplainants are devoted to discussing the width of the grant, arguing that it is only half as wide as settled and adjusted after much litigation between the Government and the railroad company, and this protracted argument is advanced after counsel admit at p. 88:

“Now, it is true that all the lands in controversy in this suit are within ten miles of the line of the road as fixed by the map of definite location of the road, and that the road was constructed upon that line and that these lands are within the primary limits under the proper construction of the grant.”

This demonstrates that it is purely a moot question in this case, but in response to this argument on the width of the grant and “excess of land” the following is conclusive:

The argument of counsel in this connection is an attempt to give a forced and unnatural construction to the provisions of the grant reading “ten alternate sections of land per mile on each side of the railroad

whenever it passes through any state'' (and the same provision with respect to territories, except that when the road passes through territories, the grant is of twenty sections per mile on each side of the road,) from which counsel argue that ten sections on each side means five on one side and five on the other.

It should be a sufficient answer to this contention to call attention to the fact that the Interior Department has interpreted this and all other grants similarly worded to mean ten sections upon one side and ten sections upon the other; and that is also the interpretation which has been given to the grant by the Government, for all of the overlap cases in which the respective rights of the Government and of the railroad company were litigated were based upon this construction of the granting act.

6 L. D. 351 and *S. P. R. R. Co. v. U. S.*, 183 U. S. 525, relied upon at page 86 of crosscomplainants' brief, do not sustain counsel's contentions. In the Land Decision, the width of the grant was not before Secretary Lamar, and, as often happened in such cases, the intervening even numbered sections were overlooked and the grant referred to as of width equal to the specified odd numbered sections. In the 6 L. D., at page 86, however, Secretary Lamar did have before him the question of the width of the grant and in referring to the order for

survey and withdrawal of the land for *forty miles on each side of the road* he said:

“Now here was a grant to the free, alternate odd-numbered sections to be found within twenty miles on each side of the road in the States, and within forty miles in the Territories; with the right to take the free odd-numbered sections found within a further limit of ten miles, as indemnity for lands lost in the granted limits. The order was for the survey of the lands ‘for forty miles in width’ or only to the extent of the granted limits in the Territories, and ten miles beyond the granted and indemnity limits in the States.”

And see *S. P. R. R. Co. v. Bell*, 183 U. S. at page 686 for the same construction.

The foregoing quotation from Secretary Lamar’s opinion shows the erroneous deduction sought to be made from the order providing for the survey of the grant for forty miles in width discussed at pp. 83-84 of cross-complainants’ brief which arises here through the same error involved in counsel’s interpretation of the granting act, for the surveyed strip was to be, not forty miles in width, but forty miles on each side of the grant, a total width of eighty miles.

Nor do the provisions of the grant require that all indemnity land should be selected within twenty miles of the lines of the road, but the phrase quoted at page 85 of crosscomplainants’ brief has reference to a special mineral land lieu provision found in this grant and the

grant to the Northern Pacific, permitting the selection, in addition to the other lieu provision, of lands in lieu of lands lost because mineral in character, wherever within the place limits of the grant land had been excepted because of an apparent claim thereto at the time of the definite location of the road which was subsequently held to be invalid.

That is the recognized interpretation of the phrase quoted by counsel and land has been patented in accordance with it, as shown by 26 L. D. 452 and other Land Department records.

But counsel argue that this cannot be true, because *K. P. R. Co. v. Dunmeyer*, 115 U. S. 629, and some other cases referred to at pp. 90-91 of the brief hold that lands lost within the place limits of the grant by reason of a claim thereto at the time of the definite location of the road, if such claim is subsequently declared invalid, do not pass under the railroad grant. Counsel overlooks, however, that those decisions all apply to primary lands and that the sole test of the right to select indemnity land is that it be within the indemnity limits provided and be *public land at the date of selection*.

In view of the many decisions interpreting this and similar grants and of the uniform rule under which they have all been finally adjusted, it would serve no

useful purpose to pursue this discussion further, particularly in view of the fact that it is purely a moot question in this case, as counsel admit that the land in suit is within ten miles of the line of road as located and constructed.

Counsel assert, however, that their purpose in endeavoring to establish that the grant is only half as wide as adjusted, is to support their allegation that the railroad company has received more land than it is entitled to under the grant, from which it is argued that the patent is void. Assuming that it were true that the railroad company had received more land than it was entitled to, it would be solely a matter between the Government and the defendant railroad company, for complainant is not in privity with the Government (*Deweese v. Reinhard*, 61 F. 777). And even if the patent were void, the statutes of limitation have rendered it impregnable to attack (*U. S. v. Chandler-Dunbar*, 209 U. S. 447).

It is also a well settled rule that even one entitled to attack a patent must aver with great certainty and particularity all facts necessary to establish its invalidity (*Maxwell Land Grant Case* 121 U. S. pp. 380-81); and the allegation herein that the railroad company has received land in excess of that to which it is entitled is at most but a conclusion.

Further, the allegation says "has received," which might be subsequent to the patenting of the lands in suit, in which case the invalidity, if any, would exist as to the lands subsequently patented and not affect the patent at bar.

IV.

The argument between pages 94-98 of crosscomplainants' brief relating to non construction of the road in 25 mile sections is fully discussed in defendants' brief in the Burke case, to which the Court is respectfully referred.

V.

The discussion of the statutes of limitation between pages 98 and 105 of crosscomplainants' brief, is also fully answered by defendants' brief in the Burke case.

It is respectfully submitted that the demurrer to the cross-bill should be sustained.

GUY V. SHOUP AND D. V. COWDEN,
Attorneys for S. P. R. R. Co. and Kern T. & O. Co.

WM. SINGER, JR.,
Of Counsel for S. P. R. R. Co. and Kern T. & O. Co.

IN THE
**United States Circuit Court
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FOR THE NINTH CIRCUIT

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Trustees,

Appellants
Petitioners,

vs.

SOUTHERN PACIFIC RAILROAD COM-
PANY, KERN TRADING AND OIL COM-
PANY and T. S. MINOT,

Appellees,
Respondents.

No. 2028
In Equity

REPLY BRIEF OF RESPONDENTS

**Opposing Application for Certification of Question
of Law to Supreme Court**

CHARLES R. LEWERS,
GUY V. SHOUP,
828 Flood Building,
San Francisco, California.
Solicitors for Appellees
and Respondents.

Filed

DEC 1 - 1914

F. D. Moulton.

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REPLY BRIEF OF RESPONDENTS OPPOSING APPLICATION
FOR CERTIFICATION OF QUESTION OF LAW
TO SUPREME COURT

The petitioners ask this Court to submit another question to the Supreme Court, under authority of Section 239 of the Judicial Code, after this Court has already submitted a number of questions and received the answers of the Supreme Court. Section 239 of the Judicial Code says that these answers

“shall be binding upon the Circuit Court of Appeals.” This means that the answers already given must be taken as the law of this case.

This Court is now urged to say to the Supreme Court, “Did you not make a mistake in your interpretation of the Act of July 27, 1866”? In other words, this Court is asked to petition the Supreme Court for a rehearing after the applicants now before this Court have let the time for such a petition expire.

Mr. Hinkley’s brief, in support of this petition, is very long. It is not necessary to follow it in detail. It is made up of reiterated statements of the single proposition that the Act of July 27, 1866, *excluded* mineral lands from its operation and that therefore the functions of the land department of the government were legally paralyzed whenever it was attempted to issue a patent to the railroad company of land actually mineral in character, whether known or not. He argues at great length that this railroad grant was special and peculiar in this respect, and not to be compared with general homestead or desert land acts. He asserts that the Supreme Court “inadvertently” overlooked this special and exclusive character of the grant.

Mr. Hinkley is not asking this Court to submit an additional question to meet a point not answered by the Supreme Court. His contention is that that Court was *wrong* in every answer it made, except

when it said that petroleum is a mineral. (See pages 3 to 8 of his brief.) By this he necessarily admits that the Supreme Court squarely met his present contention and decided it adversely to him in six of its seven answers. There has, therefore, been no failure to pass on the contention raised by Mr. Hinkley.

Nor was the Supreme Court unconscious that it was rejecting this contention. Mr. Hinkley filed a brief in the Supreme Court in this case, 127 pages long, of which 117 pages were devoted to the discussion of the very points he raises in his present brief. He also made an oral argument in that Court devoted almost wholly to the same contentions. This Court, in its certification of the second question, called particular attention to the fact that the grant *excluded* mineral lands. The same suggestion was contained in other briefs, and there is no doubt that the Supreme Court was well advised as to the necessity of considering and determining the contention now raised by Mr. Hinkley.

The official report of the decision of that Court appears in 234 U. S., at page 669. Pages 683 to 692 are devoted to the discussion of the contention that mineral lands are excluded from the operation of the grant. Mr. Hinkley's argument is there squarely met and disposed of. The Court knew what it was doing and was not at all inadvertent in its rejection of Mr. Hinkley's theory. It is therefore apparent that this Court is really being asked

to tell the Supreme Court that its decision is *wrong*. If this Court should certify the question Mr. Hinkley presents, the only answer the Supreme Court could make would be to point to Section 239 of the Judicial Code, which says that the answers already given are binding on this Court.

Mr. Hinkley's argument is verbal rather than substantial. Even though mineral lands are *excluded* from the operation of the Act, other lands are not. Some one must decide what lands are properly patentable. Section 4 of the grant throws this duty on the officers of the land department. Mr. Hinkley admits that they may patent lands that are non-mineral. Necessarily they must decide which lands fall within that category. His theory is that they have power to reach a decision which is right, but not one which is wrong. If they have jurisdiction to enter upon the inquiry and to reach a decision, they must also have the *power* to reach a wrong decision. The only way this result can be avoided, as a practical matter, is to deny them the power to enter upon the inquiry at all. This would result in no patents whatever being issued under the railroad grant.

The fallacy in Mr. Hinkley's contention is shown in his attempted explanation of the case of *Barden vs. Northern Pacific R. R. Co.*, 154 U. S. 288. He claims that that case is an "absolute authority" in his favor, yet explains elaborately that his present contention was not considered in that case, because

the mineral claimants did not need to raise it, and the railroad company was afraid to do so. Therefore, it seems according to his brief, the Supreme Court contented itself with holding that title to hidden minerals did not pass at the date of definite location but would pass only at the date of the patent. He explains this latter proposition on the ground that there was in that case a contest between mineral claimants and the railroad company. This, he says, gave the land department jurisdiction to pass on the mineral character of the land *under the mining laws*, not under the railroad grant. Apparently, therefore, a patent to the railroad company of land actually mineral would be good when there was a mineral contest, but not otherwise.

This is a refinement we are not able to follow. Whether there was a mineral contest or not, the patent would issue to the railroad company under the operations of the railroad grant. Therefore the holding in the Barden case that such a patent would pass the title to the railroad company cannot be explained or distinguished in the manner suggested by Mr. Hinkley. The Supreme Court itself has made the proper application of the Barden case in its decision of the present case.

In this decision, the Supreme Court has said that there is no essential distinction between railroad and other grants (*p. 692*). It is now argued that our grant is peculiar because it provides that mineral lands "are excluded from the operations of

this Act.” This means no more than do words granting lands “not mineral.” Both in fact grant only lands that are not mineral. Both *exclude* mineral lands from their operation, one by the express use of the word, and the other by strict limitation to non-mineral lands. Both are however, subject to the lawful administrative power of the land department to determine what lands are to be patented as coming within the description in each grant.

The words just referred to are no more restrictive than similar expressions found in many other grants, all of which have been commonly interpreted as giving the land department power to determine what lands shall pass. For instance, in the grant of July 2, 1862, to the several states for agricultural colleges, it was provided “that no mineral lands shall be selected or purchased under the provisions of this Act.” (2 *Lester*, 59.) Since that time, several other grants have been made for the same purpose, and it has been held that the land department had power to determine whether the selected lands were mineral or not.

Buena Vista Petroleum Co. vs. Tulare Oil & Mining Co., 67 Fed. 226;
Southern Development Co. vs. Endersen 200 Fed., 272.

Many other similar restrictions in general and special grants might be cited, under which it has been held that the land department has jurisdiction

to decide whether land is mineral or not. Reference will be made to only one of these, however, as it is the most striking. The Townsite Act (*Rev. Stats, Sec. 2392*) provides "that no title shall be acquired under the provisions of this Act to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws."

This restriction is far more emphatic than the exclusion clause we are considering. Mr. Hinkley recognizes this and argues at length that the words just quoted absolutely exclude known mines from passing under a townsite patent. In support of this he cites *Davis vs. Weibbold*, 139 U. S., 507. In that case there was issued both a townsite patent and later a mineral patent. The Court does not say that the townsite patent passed no title to the land covered by the later mineral patent. It did say, at page 528 of the opinion that if the introduction in evidence of the mineral patent had been objected to, a very serious question would have arisen as to whether the land department had not lost jurisdiction by the issuance of a townsite patent. As the issues were framed, it was not necessary for the Court to determine this point. But in the later case of *Moran vs. Horsky*, 178 U. S., 205, it was held that a townsite patent passed the title to even a known mining claim within the limits described in the patent, leaving to the claim owner merely an equity which might be waived by his laches. This decision was put on the ground that as the land covered by the mining claim was "apparently within

the jurisdiction of the land department as ordinary public land of the United States, then it would seem to be technically more accurate to say that the patent was voidable and not void." (*Page 212.*)

It must be obvious that when the Supreme Court held in the present case that the officers of the land department had the power to inquire and decide whether land sought by the railroad company under its grant was mineral or not, it was following an established line of precedents. It interpreted the grant in the light of its entire scope, and not as is now sought to be done by confining attention to a few expressions found within that grant.

The decision of the Supreme Court was well considered and is right. In no sense can it be said to have been inadvertent. The labored attempt made by Mr. Hinkley to attach some importance to the omission of the word "as" before the word "afore-said," in the fourth section of the grant of 1866, as it is quoted by the Supreme Court, may be dismissed from consideration, since the official report of the decision shows no such omission.

There is, therefore, no occasion for this Court to submit a further question, as such a question would necessarily involve a refusal to accept the answers already given.

December 2, 1914.

Respectfully submitted,

CHARLES R. LEWERS,

GUY V. SHOUP,

Solicitors for Appellees and Respondents.

United States
Circuit Court of Appeals
For the Ninth Circuit.

R. H. HERRON COMPANY, a Corporation,
Appellant,

vs.

WILLIAM H. MOORE, Jr., Trustee in Bankruptcy of
the CLEVELAND OIL COMPANY, a Corporation,
Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Southern District of California, Southern Division.

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Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Citation.]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 686.

In the Matter of THE CLEVELAND OIL COM-
PANY, a Corporation,

Bankrupt.

To William H. Moore, Jr., Trustee in Bankruptcy
of the said Bankrupt, Cleveland Oil Company,
a Corporation:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Ap-
peals, Ninth Circuit, at the city of San Francisco, in
the State of California, on the 28th day of February,
1913, pursuant to an appeal allowed and filed in the
clerk's office of the District Court of the United
States, Southern District of California, Southern
Division, wherein R. H. Herron Company, a corpora-
tion, is appellant, and you are appellee, to show
cause, if any there be, why the decree rendered
against the said appellant as in said appeal men-
tioned should not be corrected and why speedy jus-
tice should not be done the parties in that behalf.

Witness the Honorable OLIN WELLBORN,
Judge of the District Court of the United States,
Southern District of California, Southern Division,
this 30th day of January, A. D. 1913.

OLIN WELLBORN,
Judge of the District Court of the United States,
Southern District of California, Southern Divi-
sion. [5*]

*Page-number appearing at foot of page of original certified Record.

[Endorsed]: No. 686. In the United States District Court, Southern District of California, Southern Division. In the Matter of the Cleveland Oil Company, a Corporation, Bankrupt. Citation. Filed Jan. 30, 1913. Wm. M. Van Dyke, Clerk. Virgil W. Owen, Deputy.

Received a copy of the within Citation 30 day of January, 1913.

HICKCOX & CRENSHAW,
Attorneys for Trustee. [6]

Names and Addresses of Attorneys.

For R. H. HERRON COMPANY:

GEO. E. WHITAKER, Esq., Stoner Block,
Bakersfield, California.

For WM. H. MOORE, Jr., Trustee in Bankruptcy:
HICKCOX & CRENSHAW, H. W. Hellman
Building, Los Angeles, California. [7]

[Certificate and Report of Referee in Bankruptcy.]

*In the District Court of the United States of the
Southern District of California, Southern Division.*

IN BANKRUPTCY—No. 686.

In the Matter of CLEVELAND OIL COMPANY, a
Corporation,

Bankrupt.

To the Hon. OLIN WELLBORN, Judge of said
Court:

I, Lynn Helm, Referee in Bankruptcy, in charge

of these proceedings, do hereby certify:

That in the course of said proceedings on the 22d day of May, 1911, the R. H. Herron & Company filed a proof of debt for the sum of \$14,808.32, founded upon four certain promissory notes made by said bankrupt attached to said claim and due respectively August 21, September 10, October 24, and November 15, 1910, and upon an open account for goods, wares and merchandise amounting to the balance of \$6,376.53, which proof of claim is returned herewith, together with an itemized account of said open account filed with said proof of claim on the 22d day of May, 1911.

That on the 23d day of August, 1911, William H. Moore, Jr., the duly elected and qualified trustee herein, filed objections to said claim of R. H. Herron & Company, which said objections are returned herewith. That afterwards said objections to said proof of claim came on to be heard, and after hearing the evidence produced on behalf of said claimant and said trustee in bankruptcy, the following order was made and entered on the 3d day of October, 1912:

[9]

“In the District Court of the United States for Southern District of California, Southern Division.

IN BANKRUPTCY—No. 686.

In the Matter of CLEVELAND OIL COMPANY,
a Corporation,

Bankrupt.

Decree.

WHEREAS an involuntary petition in bankruptcy was on the 12th day of January, 1911, filed against the above-entitled bankrupt, Cleveland Oil Company, a corporation, and said corporation was thereafter, to wit, on the 20th day of February, 1911, duly adjudicated a bankrupt upon said petition; and,

WHEREAS, R. H. HERRON & COMPANY did, after said adjudication, file a claim in the above-entitled estate for the sum of Fourteen Thousand Eight Hundred and Four Dollars and Thirty-two Cents (\$14,804.32), consisting of an open account for goods, wares and merchandise sold and delivered by said claimant to said bankrupt, amounting to Six Thousand Three Hundred and Seventy-six Dollars and Fifty-three Cents (\$6376.53), and the balance of principal and interest of Eight Thousand Four Hundred and Twenty-seven Dollars and Seventy-nine Cents (\$8427.79), as evidenced by four promissory notes made by said bankrupt, attached to said claim, and due respectively August 21, September 10, October 24, and November 15, 1910; and,

WHEREAS, the trustee in the above-entitled estate filed objections to said claim, and basing his objections upon the ground that said R. H. Herron & Company had received preferences from said bankrupt, and an order having been made herein that a hearing be had upon said claim, and said [10] objections on the 25th day of July, 1912, and due notice of said hearing having been given to said claimant and to said trustee, and said claimant having appeared by

counsel on said day, and testimony having been taken thereon, and after hearing L. O. Crenshaw, attorney for the trustee in support of said objections, and George E. Whitaker in opposition thereto, and the issues having been submitted on the 25th day of July, 1912, and the referee having heretofore rendered an opinion herein, which said opinion is on file, and it appearing to the satisfaction of the Court from the evidence, the Court finds:

That the above-mentioned bankrupt, Cleveland Oil Company, was on the 15th day of September, 1910, and prior thereto, insolvent, and was on the 31st day of October, 1910, and prior thereto, insolvent, and was on the 31st day of December, 1910, and prior thereto, insolvent.

That on the 15th day of September, 1910, which said day was within four months before the filing of the petition in bankruptcy herein, the said Cleveland Oil Company did pay and transfer to said R. H. Herron & Company the sum of Two Thousand Dollars (\$2000.00) in cash to apply upon a pre-existing debt which said bankrupt owed to said claimant.

That on the 31st day of October, 1910, which day was within four months before the filing of the petition in bankruptcy herein, the said Cleveland Oil Company did pay and transfer to the claimant R. H. Herron & Company certain oil well casing of the value of Two Thousand Eight Hundred and Twenty-three Dollars and Thirty-seven Cents (\$2823.37), said transfer to apply upon a pre-existing debt owed by said bankrupt to said creditor.

That on the 31st day of December, 1910, which said

day was within four months before the filing of the petition in bankruptcy herein, said Cleveland Oil Company did pay and transfer to the claimant R. H. Herron & Company two pumps, [11] of the reasonable value of Three Hundred Dollars (\$300.00), to apply upon a pre-existing debt owed by said bankrupt to said claimant.

That on the 15th day of September, 1910, and on the 31st day of October, 1910, and on the 31st day of December, 1910, and at the time said transfers were made, said R. H. Herron & Company was a creditor of said Cleveland Oil Company. That by said transfers made on said 15th day of September, 1910, on said 31st day of October, 1910, and on said 31st day of December, 1910, and by each of them, said Cleveland Oil Company intended to give said R. H. Herron & Company a preference. That the effect of said transfer made on the 15th day of September, 1910, said transfer made on the 31st day of October, 1910, and said transfer made on the 31st day of December, 1910, to the said R. H. Herron & Company, will enable said R. H. Herron & Company to obtain a greater percentage of its debt than any other of the creditors of the Cleveland Oil Company of the same class. That said bankrupt having intended to give preference as aforesaid the said R. H. Herron & Company at the time of receiving said payment on the 15th day of September, 1910, on the 31st day of October, 1910, and on the 31st day of December, 1910, and at each of said times, had reasonable cause to believe that it was intended thereby to give a preference.

As a conclusion of law from the foregoing, the Court finds that by reason of the law and the facts, the said transfer made on the 15th day of September, 1910, and the said transfer made on the said 31st day of October, 1910, and the said transfer made on the said 31st day of December, 1910, and each of them, was and were intended to be and was and were a preference, and that the objections of the trustee of said claim of R. H. Herron & Company should be sustained, and the [12] said claim should be disallowed, and that said claim should not be allowed unless said creditor R. H. Herron & Company shall surrender such preference.

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that said claim of R. H. Herron & Company, for the sum of Fourteen Thousand Eight Hundred and Four Dollars and Thirty-two Cents (\$14,804.32) be not allowed, unless said claimant shall surrender and pay to the trustee herein the sum of Five Thousand One Hundred and Twenty-three Dollars and Thirty-seven Cents (\$5,123.37), paid to it as a preference, together with interest on the sum of Two Thousand Dollars (\$2,000), at the rate of 7% per annum from the 15th day of September, 1910; interest on the sum of Two Thousand Eight Hundred and Twenty-three Dollars and Thirty-seven Cents (\$2,823.37), at the rate of 7% per annum from the 31st day of October, 1910, and interest on the sum of Three Hundred Dollars (\$300.00) at the rate of 7% per annum

from the 31st day of December, 1910.

Dated this 3d day of October, 1912.

LYNN HELM,
Referee in Bankruptcy."

That on the 12th day of October, 1912, the said R. H. Herron & Company, feeling aggrieved with said order last aforesaid, filed a petition for review which was granted, and which is returned herewith.

That a summary of the evidence upon which said order was based, and my reasons for making said order, is found in the opinion which I filed upon the hearing of said claim on the first day of October, 1912, which opinion is as follows: [13]

That the questions presented on this review are, whether said order made by me on October 3, 1912, was correct or whether it was in error as assigned by the claimant in its petition for review.

FIRST: I hand up herewith for the information of the judge the following papers, the reporter's transcript of the testimony taken before me on the hearing of said claim, which with the exhibits hereinafter referred was all the evidence produced by either party before me on said hearing.

SECOND: I return herewith Claimant's Exhibits 1, 2, 3, 4, and Trustee's Exhibits 1, 2, 3, 4, 5, 6, 7.

Respectfully submitted,

LYNN HELM,
Referee in Bankruptcy.

Dated October 14, 1912. [14]

*In the District Court of the United States, of the
Southern District of California, Southern Division.*

IN BANKRUPTCY—No. 686.

In the Matter of the CLEVELAND OIL COMPANY, a Corporation,

Bankrupt.

**[Referee's Opinion] upon the Claim of R. H. Herron
& Co. and the Objections of the Trustee Thereto.**

GEO. E. WHITAKER, Esq., for Claimant.

Messrs. HICKCOX & CRENSHAW, for Wm.

H. Moore, Jr., Trustee.

HELM, Referee.

Upon proof of debt of the R. H. Herron & Co., for the sum of \$14,804.32, consisting of an open account for goods, wares and merchandise sold and delivered by said claimant to said bankrupt, amounting to \$6,376.53, and the balance of principal and interest of \$8,427.79, as evidenced by four certain promissory notes made by the said bankrupt attached to said claim and due respectively, Aug. 21, Sept. 10, Oct. 24, and Nov. 15, 1910. Objections were filed thereto by Wm. H. Moore, Jr., trustee, to the effect that within four months preceding the filing of the petition in bankruptcy said claimant had received certain payments on account and had accepted certain transfers of property to apply on said account, with reasonable [15] cause for believing that a preference was intended to be given it thereby, and that said claimant had not surren-

dered said property or money so received by it.

The petition in bankruptcy herein was filed in this court on the 12th day of January, 1911, and thereafter on the 20th day of February, 1911, the said Cleveland Oil Company was duly adjudicated bankrupt, and on the 3d day of April, 1911, Wm. H. Moore, Jr., was duly elected trustee of said bankrupt and qualified as such.

At all times within four months preceding the filing of the petition in bankruptcy herein, said bankrupt was insolvent, that is to say, the aggregate of its property, exclusive of any property which it had conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay its creditors, was not at a fair valuation sufficient in amount to pay its debts. The schedule in bankruptcy herein showed that the said bankrupt was at the time of the filing of the petition in bankruptcy indebted on secured claims in the amount of \$103,271.02, and unsecured claims, \$34,234.61. The property which came into the hands of the trustee in bankruptcy, being property held by the bankrupt at the time of the filing of the petition in bankruptcy, did not exceed the sum of \$10,000, and that was entirely from oil that was produced on leases held by the bankrupt.

At the request of the stockholders on the 26th of October, W. P. Mushet, an expert accountant, commenced the examination of the books, accounts and affairs of the company and made a report thereon on the 21st day of November, 1910. The claimant's manager was not advised of this report until he saw

it published in a newspaper December 20, 1910. The report shows that September 30, 1910, the bankrupt's liabilities [16] amounted to \$57,529.06; in addition to this, there was a bonded indebtedness of \$100,000. Its assets consisted of oil properties and leases known as the California Kern, France Midway, the Volcan lease and the York Syndicate. On these there had been expended a large amount of money, but the leases had turned out to be of very doubtful value and went back and were forfeited to the lessees. The office furniture and fixtures cost \$770.92. These, with the exception of oil on hand, which was afterwards sold by the trustee, were all the available assets of the company. The financial condition of the bankrupt was practically the same at all times within four months of the filing of the petition in bankruptcy as it was at the date of said filing.

On the 15th day of September, 1910, and within four months preceding the filing of said petition in bankruptcy herein, the said bankrupt while insolvent, transferred and paid to said claimant, who was then and still is a creditor of said bankrupt, the sum of \$2,000 in cash to apply upon a pre-existing debt the said bankrupt owed to said claimant; afterwards, on the 31st day of October, 1910, said bankrupt, while still insolvent, transferred to said claimant, who was then and still is a creditor of said bankrupt, certain oil well casing of the value of \$2,823.37, the said transfer to apply upon a pre-existing debt owed by said bankrupt to said creditor; and afterwards, on the 31st day of December, 1910, said bankrupt while still insolvent, transferred to said claimant, who was then

and still is a creditor of said bankrupt, two pumps of the reasonable value of \$300 to apply upon the pre-existing debt owed by said bankrupt to said claimant, and the effect of each of said transfers hereinbefore mentioned was to give to said creditor a greater percentage of its claim than to other creditors of the same class. The bankrupt, [17] theretofore being insolvent, must be held to have given a preference to said claimant.

The intent of the debtor, in the absence of other proof, may be shown by its equivalent in law, proof of the inevitable result of the transaction, which in the case at bar was to give a preference and to create an unequal distribution of the bankrupt's estate. The bankrupt at the time of these payments and transfers of its property not only knew that it was insolvent, but it knew that it was so irretrievably so that it could not hope to continue its business without some sort of reorganization, and its officers knew it could not make the payment which it did without disparity in its payments to its other creditors. If the effect of the act was to create a preference, and such was its natural consequence, it must be presumed to have intended to do that which was the necessary result of its act. *Western Tie & Timber Co. vs. Brown*, 196 U. S. 502, 508.

Whether or not said claimant at the time it received said cash and property had reasonable cause to believe by said payment and transfers it was given a preference, is the only other question to be determined in this matter.

The bankrupt, the Cleveland Oil Company, was operating certain oil wells and properties in the Kern River field and in the Midway oil field at the time of the filing of the petition herein, and had been for a period of a year or more prior thereto. Commencing with about the 23d day of February, 1909, the claimant had sold and delivered to said bankrupt a large quantity of goods aggregating over \$20,000. For part of the indebtedness due from the bankrupt to the claimant on account of goods sold, notes had been given, four of which are in evidence herein, dated respectively May 23, May 9, June 9, and July 16, 1910, and aggregated \$12,726.68, which evidenced [18] goods purchased by the bankrupt of the claimant prior to July 1, 1910, and which were not paid for in cash. During July, 1910, goods were sold on open account amounting to \$3,547.23, during August, 1910, \$2,920.76, and during September, 1910, \$65.54, a total of \$6,533.53.

While the bankrupt had been a large purchaser during the months previous to September 1, 1910, claimant on the 21st of September had notified its several stores at Bakersfield, Taft and Maricopa in Kern County, that the bankrupt was only privileged to buy supplies for emergency requirements not exceeding \$50 in any one order, and if they wanted anything in excess of the emergency supplies, it was to be communicated to the Los Angeles office, where was the credit man of the claimant. Prior to that, on July 22, 1910, the managers of the stores of the claimant were advised that the state of the account with the Cleveland Oil Company was such that they

could only deliver goods to the Cleveland Oil Company in small quantities, not exceeding \$100, and anything in excess of that was to be referred to the Los Angeles office. On August 5, one of the managers of the claimant in the oil fields wrote the claimant that he was delivering goods to the Cleveland Oil Company in small quantities almost daily and wanted to be advised when the claimant expected a settlement from the bankrupt; that the amounts were not large, but exceeded the sum of \$100 named in their letter of advice of July 22d. On August 6 the claimant authorized its agents to deliver to the company 11,000 feet of 8 $\frac{1}{4}$ inch No. 28 casing, for the reason that the bankrupt had that day promised them to pay its equivalent in cash, and it then paid claimant \$1,500.

Notwithstanding the reiterated testimony of Mr. Sands, the general manager and treasurer of the claimant and who acted as its credit man, that he did not know, when he received the [19] payment of \$2,000 from the bankrupt on September 15, 1910, or on the 26th day of October, when he authorized his manager to accept a return of certain oil well casing for which credit was given on the 31st of October, or at the time the two pumps were returned November 25, 1910, that the bankrupt was insolvent, and that he had no reason to believe that any preference was intended to be given to the claimant R. H. Herron & Co., the testimony shows that he had reasonable cause to believe that the bankrupt was giving to the claimant a preference.

It was not necessary that the claimant should have

had knowledge that the preference was intended, nor was it necessary that he should believe that a preference was intended; it was only necessary that he should have had a reasonable cause to believe that a preference was intended, which is far different. This exists, according to the accepted doctrine, where the surrounding circumstances were such as to put a person of ordinary business intelligence upon inquiry or to induce the belief that he is given more than other similar creditors. Notice of facts that would incite a man of ordinary prudence to inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose. In *re Eggert*, 102 Fed. 735; *Stuart vs. Farmers-Merchants' Bank of Cuba City (Wis.)*, 21 Am. B. R. 403; *Grant vs. Bank*, 97 U. S. 80; *Bank vs. Cooke*, 95 U. S. 343; *McElvain vs. Hardesty*, 22 Am. B. R. 320; *Wright vs. Sampter*, 18 Am. B. R. 355; *Wright vs. Skinner Manufacturing Co.*, 20 Am. B. R. 527; *In re Goodhile*, 130 Fed. 471; *Sundheim vs. Ridge Avenue Bank*, 15 Am. B. R. 132; *In re Virginia Hardwood Mfg. Co.*, 15 Am. B. R. 135; *In re Dorr*, 196 Fed. 292; *Collier on Bankruptcy*, 9th Ed. 815, and cases cited.

The bankruptcy act has added a new and very serious limitation upon the freedom of business intercourse. Any act, however, in the ordinary course of business, by which a merchant [20] pays a debt is liable to be reviewed and rescinded, if it happens within four months thereafter the debtor becomes bankrupt.

The claimant in the testimony given by its man-

ager and in the letters by it produced upon the hearing has furnished the evidence from which it must be found that the claimant had reasonable cause to believe, when it received the payment made to it and the property transferred to it, from the bankrupt, that it was receiving a preference over other creditors of said bankrupt.

At the time that the oil well casing was delivered by the bankrupt to the claimant, about the last of October, 1910, Mr. Sands, on behalf of the claimant, insisted upon a payment being made upon the account. The claimant had a guarantee from W. A. France, President of said Cleveland Oil Company, that he would be responsible for the account, and Mr. Sands was threatening to call upon him for a payment. He had been at the office of the company two or three times and they had been down to see him, and finally Mr. Edson France, the vice-president of the bankrupt company, and a brother of W. A. France, went down to see Mr. Sands and told Mr. Sands that they did not have any money to pay on account of the notes which were overdue, but that they had some piping and casing which they had bought of the claimant at the oil fields which they would return. Mr. Sands said he would take it and give the bankrupt credit therefor at 75 cents on the dollar for what they paid for it. This was a fair price for second-hand casing in the field. It was not unusual for oil supply dealers to take back at a discount casing which they had sold to oil companies operating in the oil fields. It was quite frequently done and 25% was the usual discount. So far as Edson

France knew, Mr. Sands did not go into the financial condition of the company, and Mr. Sand's own testimony shows that he did not. Mr. Sands, however, wrote [21] October 18, 1910, to his district manager at Taft, as follows: "The Cleveland Oil Company owe us considerable money and they are not in position to supply the ready cash. Their stock is almost worthless from a stock market view, the last sales being passed at $23\frac{1}{4}$ cents. They are endeavoring to arrange the company on a good financial basis, but that will take some time. They have arranged to deliver us a string of 10" No. 40 casing on the well they are drilling in the midlands, and we have promised to give them credit when delivered to our stock at Moron, at list less 25%." The proposition to return the goods came from Mr. France and Mr. Sands agreed to it, saying if he would take it back to the store, the claimant would give credit on the account. The only reason that was given for Mr. France offering to return the goods is that he told Mr. Sands that they did not have any cash on hand at the time, and that they were willing to return the casing. At that time the company owed a great many other debts, but a similar offer was not made to any other creditors. Mr. France told Mr. Sands that they did not have any money in the treasury, but they had some oil in storage in the Kern River field and expected to sell that and get some money. There had been a fire in the refinery of Warren Bros., where the bankrupt refined its oil, and the bankrupt had about 10,000 barrels of oil in storage which could not be refined, and Mr. France told him as soon as they

could get some money out of it they expected to pay a part of the indebtedness, that they expected to make a payment on account and also on the notes. Mr. Sands was told that the property at that time was not producing sufficient to pay more than certain small debts and labor claims.

At the time the \$2,000 was paid, September 15, 1910, nothing was said, but there is testimony that this \$2,000 was paid on account of a promise made when additional goods were [22] sold by the claimant to the bankrupt August 6, 1910, on account of an immediate payment promised. The money was paid in the ordinary course of business and no conversation took place between the officers of the claimant or officers of the bankrupt in reference thereto.

Prior to this, however, facts had been brought to the knowledge of the claimant that were sufficient to have put a reasonably intelligent person upon inquiry.

The general manager of the company knew as early as February 18, 1909, what were the Cleveland Oil Company's holdings in the Kern River field. He was advised by one of his district managers, on whose information he relied, that they were about to commence operation upon 10 acres in section 8-29-28, known as the York Syndicate property, and also upon 17½ acres in the same section known as the Volcan property, and they were endeavoring to secure other property. At that time the Volcan had one producing well and the York Syndicate two wells. Mr. Sands had been by the property at another time in the Kern River field and testifies that

they had quite a number of wells dug there; that they seemed to be in a very prosperous condition and they were all in where there were producing oil wells, and in addition to that at that particular time the company had a lease on what was considered valuable oil land in the midway next to the Buick Oil Company. December 23, 1909, he knew from Dr. France, the president of the company, that they had eight producing wells and were getting from 8,000 to 10,000 barrels of oil per month.

January 11, 1910, the claimant by its treasurer notified the Oil Well Supply Company at Taft, Cal., that it was privileged to deliver the Cleveland Oil Company supplies to the amount of \$1,500, but for anything in excess of that amount they would communicate with the Los Angeles office. The treasurer [23] says: "They are owing us considerable money and they have not acquired the habit of discounting their bills, which is our reason for the limited credit."

It is no doubt true that credits are often determined under conditions of the account at the time the requisitions are demanded. On January 21, 1910, the treasurer notified the Oil Well Company at Bakersfield, Moron, Maricopa, that the amount of the open account of the Cleveland Oil Co. was \$4,819.58, and that they owed a note due February 28, for \$2,055.42, and another due February 15th, for \$6,617.16, and that they felt that this was quite enough, provided the information which was given them by their district manager at Bakersfield the other day was correct; that they were owing considerable sums for lumber bills and there were other

creditors for other small bills who were not able to get their money; and the letter requested a report from each representative of the company in his district as soon as possible to tell them as regards their holdings, and in the meantime permitting them to make deliveries amounting to \$1,000 for all three stores of the claimant. On August 5, 1910, the Oil Well Supply Company, with which the claimant is affiliated, wrote to the treasurer above named that they were delivering goods to the Cleveland Oil Company in small quantities daily since a telephone communication between the manager at Bakersfield and the treasurer a few days previous, when they were advised that the treasurer expected a settlement from the Cleveland Oil Company. August 6, 1910, the bankrupt owed the claimant almost \$20,000, and the manager at Bakersfield was notified by Mr. Sands to communicate with him before delivering them any great amount of goods.

On the 22d day of August, they were advised that the refinery of Warren Bros. in the Kern River fields, which was operated for the benefit of the Cleveland Oil Company, was destroyed [24] by fire. The secretary of the claimant wrote Mr. Sands as follows: "Had a talk with Mr. Batchelder of the Cleveland Oil Company this morning. It seems that their refinery in the Kern River field burned down Saturday and that they are having trouble in raising the \$1,700 necessary for the 1000 feet 8-inch casing for the Kern River field. It seems that the National sent them a car of 8 $\frac{1}{4}$ " to the Midway field and by mistake their superintendent unloaded it and hauled

it out. You know we gave them 1000 feet there and the result is that they have 2000 feet too much in the Midway field, and have none in the Kern River. They have not taken care of their note due to-day. We are simply giving you this information that you may be in touch with the matter." Mr. Sands endorsed upon this letter a most singular notation, to wit: "Keep after them at least twice a day; make them come through." In common parlance, this, even for a credit man, was "going some," and after information which caused him to give directions to keep after a debtor at least twice a day and make it come through, it would be hard to say that he did not have reasonable notice to put him upon inquiry.

It is true that the account between the Cleveland Oil Company and R. H. Herron & Co., the claimant, was active prior to August 1, 1910. Of the credits given during August, \$1,686.32 was due to the payment of \$1,500 on August 6. There were practically no credits extended to the company during September, and none after October 1st. Upon the notes offered in evidence there were no payments made, except the \$2,000 of September 15th, and the \$2,823.37, less interest, which was credited October 31st of casing returned as aforesaid, the payments here in question. The notes as received from the Cleveland Oil Company were endorsed and discounted by the claimant at its bank. The Cleveland Oil Company did not pay the note due August 21, amounting to \$2,868.15, and the claimant had to take up that note [25] at the bank, and it was overdue and unpaid at the time of the giving of the preference here in

question. The claimant was advised that the Cleveland Oil Company did not have the money at that time to protect the note, and they have as an excuse that they had been disappointed in not receiving it in time. At the time they made the payment of \$2,000 they had been promising the claimant cash for several weeks.

It is probably true that the claimant did not fully investigate the question of the bankrupt's solvency or insolvency because the claimant was satisfied with the guarantee, which it had received from Dr. W. A. France, the president of the company, whom Mr. Sands was advised was financially responsible, that he would see that all claims of the Cleveland Oil Company to R. H. Herron Co. would be paid. If, however, they had made a reasonably diligent inquiry—which they were reasonably bound to have made—it would have disclosed the fact that the Cleveland Oil Company was insolvent at the time the payments, which are in question in this matter, were made to the claimant, and that the claimant was receiving a preference over other creditors.

In *Re Deutschle*, 25 A. B. R. 348, 182 Fed. 435, it appeared that within four months prior to bankruptcy, payments had been made by the bankrupt on notes for a lumber account which had frequently gone to protest and been the subject of constant complaint. Notwithstanding this, the claimants had accepted an order for more lumber, and were about to fill it, when they learned that the bankrupts were in difficulty and did not do so. They were also advised, on inquiry of a bank where the bankrupts were in

business, that their condition had improved, and it was thought that they would pull through. It was held that this suggested critical embarrassment was enough to put claimants on inquiry, and that their claim for the balance [26] due on the notes could not be allowed without surrendering the payments received during the four months' period, which constituted voidable preferences.

See, also, *In re Leader*, 26 A. B. R. 668.

It is established by the Bankruptcy Act, sec. 57c, that the claims of creditors who have received preferences voidable under sec. 60, subdiv. b, shall not be allowed, unless such creditors shall surrender such preference.

The allegations of the objections to the claim of the claimant herein are true, and for the foregoing reasons the objections to the claimant filed herein must be sustained and the claim disallowed, unless said claimant shall surrender the preferences aforesaid.

LYNN HELM,
Referee.

[Endorsed]: No. 686. In the United States District Court, Southern District of California, Southern Division. In the Matter of Cleveland Oil Co., a Corporation, Bankrupt. Referee's Opinion upon Claim of R. H. Herron & Co. and the Objections of the Trustee Thereto. Filed Oct. 1, 1912, at 10 o'clock A. M. Lynn Helm, Referee. Lynn Helm, Los Angeles, Cal., 918 Title Ins. Bldg.

[Endorsed]: No. 686. In the United States District Court, Southern District of California, Southern Division. In the Matter of Referee's Report on Petition for Review in Re Cleveland Oil Company, a Corporation, Bankrupt. Filed October 22d, 1912, at 40 min. past 9 o'clock A. M. Wm. M. Van Dyke, Clerk. By E. H. Owen, Deputy Clerk. Lynn Helm, 510 Los Angeles Trust Building, Los Angeles, Cal. [27]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 686.

In the Matter of the CLEVELAND OIL COMPANY, a Corporation,

Bankrupt.

Transcript of Testimony on Hearing on Claim of R. H. Herron Company.

Before Hon. Lynn Helm, Referee, at his office, Room #918 Title Insurance Building, Los Angeles, California, on the 24th day of July, 1912.

Messrs. HICKCOX & CRENSHAW, Attorneys
for Trustee.

GEORGE E. WHITAKER, Esq., Attorney for
R. H. Herron Co.

Filed Sep. 4, 1912, at — o'clock — M. Lynn Helm, Referee. [28]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 686.

In the Matter of the CLEVELAND OIL COM-
PANY, a Corporation,

Bankrupt.

Messrs. HICKCOX & CRENSHAW, Attorneys
for Trustee.

GEORGE E. WHITAKER, Esq., Attorney for
R. H. Herron Company.

Los Angeles, Cal., July 24, 1912.

Ten o'clock A. M.

[Testimony of Edson France, for the Trustee.]

EDSON FRANCE, a witness produced on behalf
of the trustee, being first duly cautioned and solemnly
sworn to testify the truth, the whole truth and noth-
ing but the truth, testified as follows:

Direct Examination.

(By Mr. CRENSHAW.)

Q. You were an officer of the Cleveland Oil Com-
pany during the fall of 1910?

A. Yes, part of 1910; from about the middle of
July.

Q. From the middle of July until when?

A. Well, I don't know whether I was an officer or
not—

Q. You were an officer of the company as long as
it existed? A. Yes, sir. [29]

Q. You prepared the schedule of debts and assets

(Testimony of Edson France.)

of the company which are on file?

A. No, I didn't prepare anything—that is, I didn't prepare it.

Q. You seem to have signed it.

A. I probably looked it over and signed it; that is all so far as I remember.

Q. How did you arrive at the assets and liabilities?

A. Well, I suppose it was mostly from memory.

Q. (By the REFEREE.) Well, was it from the books of the company or anything like that?

A. I don't know whether we had the books at that time.

Q. What is the date of it?

A. What is the date of it?

Q. It was filed on the 20th of January.

A. Yes, I suppose it was taken from the books.

Q. No—it was prepared after that, on the 16th day of March. Do you know whether or not it was compiled from Mr. Mushet's report?

A. I don't know whether it was prepared that way or not.

Q. It is a correct statement of the assets and liabilities, is it? A. Yes, sir.

Q. Between the 16th day of March, 1911, and the 12th day of September, 1910, was there any material change in the assets and liabilities of the company?

A. Not to my knowledge, there were no changes.

Q. There was no new property acquired during that period? [30] A. No.

Q. None of your property disposed of during that

(Testimony of Edson France.)

period? A. Not to my knowledge.

Q. Were you operating during that period at all?

A. Part of the time, the first part of the time.

Q. How long after the 12th of September were you operating?

A. Up until we went into bankruptcy. I don't know how long.

Q. (By the REFEREE.) From the 12th of September that fall, did you operate up to the first of January?

A. Yes, they were operating up in the Kern River field.

Q. They were operating in the Kern River field from the 12th of September to the 1st of January?

A. No, that was 1910.

Q. (By the REFEREE.) In 1910 you were operating? A. Yes, sir.

Q. In 1911 you did not?

A. From the first of September, 1910, to the first of January, 1911, you see, the order of adjudication was made.

Q. (By the REFEREE.) That is it. From the first of September, 1910, to the first of January, 1911, were you operating during that time?

A. Yes, sir.

Q. What was the nature of your operations during that time?

A. Producing some oil in the Kern River field.

Q. Were you drilling any wells?

A. Not at that time that I remember. [31]

(Testimony of Edson France.)

Q. Did your production take care of your operation?

Mr. WHITAKER.—That is objected to on the ground that it is not the best evidence and further that it calls for the conclusion of the witness.

The REFEREE.—Objection sustained.

Q. Could you tell by examining the books as to what was the cost of production?

A. I could not. I am not very familiar with the books, and I was never financially interested with the Cleveland Oil Company, I was simply put in to fill a vacancy for a short time and never have been to the oil fields and don't know very much about it.

Q. Who were familiar with the books?

A. Mr. Batchelder was secretary. I was just put in to fill this vacancy and I never got very much knowledge about it. I have not seen the books for a year, I think, and that is the reason I have forgotten.

Q. Are you acquainted with the R. H. Herron Company? A. Yes, with Mr. Sands.

Q. Did your company have dealings with R. H. Herron Company during 1910? A. Yes, sir.

Q. And become indebted to them?

A. Yes, we bought goods of them right along.

Q. Do you remember when you ceased to buy goods from R. H. Herron Company?

A. No, I could not give you the date, probably in July, 1910, somewhere along there, maybe a little later. [32]

Q. That time you were indebted to them?

(Testimony of Edson France.)

A. Yes, sir.

Q. Did you say Mr. Sands was their representative with whom you did business?

A. Yes, I talked to Mr. Sands several times.

Q. Did you ever do business with any other officer of the Herron Company? A. I did not.

Q. During the months of August and September did you have any conversation with Mr. Sands with reference to the account of R. H. Herron Company with the Cleveland Oil Company?

A. I don't think so at that time. Judge Campbell was president of the company during that time, but I talked to Mr. Sands a little later.

Q. About what time?

A. About October or November, I have forgotten the date, somewhere in there.

Q. What was the nature of the conversation?

Mr. WHITAKER.—We object to that; we object to any conversation which took place between the witness on the stand and Mr. Sands during the month of November, 1910, on the grounds that the objection to this claim being allowed relates to a later period—I will withdraw that, I see there is one item in December.

(Question read by Reporter.)

A. Why, it was in regard to paying the bill we owed Mr. Sands; making payment on the account, and the notes.

Q. Well, can you detail those conversations, what was said by you and what was said by Mr. Sands?

(Testimony of Edson France.)

A. Well, Mr. Sands said he had to have some money on account, on some notes which were due, and at that time I told Mr. Sands that we didn't have any money, but we had some piping and things which we bought of him at the oil fields which we would return. He said he would take them and give us credit, I think, for 25 per cent less than what we paid for it, something like that.

Q. Did Mr. Sands ever go into the financial condition of the company with you?

A. I don't think that he did.

Q. He never asked you about how the company stood, what its obligations were, or what its assets were?

A. I don't remember. I presume he had found that out before that.

Q. Prior to October or November did you ever give him any statement?

A. I don't remember of giving him any statement.

Q. When were those notes given?

A. At different times. I could not tell you.

Q. Do you know of any other occasion of giving the notes except the carrying of this account as an open account?

A. I don't know very much about it.

Q. You don't know why it was done?

A. When they could not pay their bill when it was due, they gave a note, as I understand.

Mr. WHITAKER.—If you know how to answer of your own knowledge, state it; not otherwise.

The WITNESS.—Well, the fact is I don't know

(Testimony of Edson France.)

anything about it except what the books show, and I didn't keep the books. [34]

Mr. CRENSHAW.—Are those notes on file here?

The REFEREE.—Yes, right here.

Q. Who are they signed by?

A. They are signed Cleveland Oil Company by W. A. France, President, and W. J. Batchelder, Secretary. There are different dates on them here.

Q. Now, Mr. France, when you had this conversation, which you say was sometime in October or November, with Mr. Sands, and told him that you could not pay him the account, and that he would have to take back some of the old machinery if he got anything, what did he say?

Mr. WHITAKER.—We object to counsel stating facts not shown by the testimony. The witness never testified he told Mr. Sands the Herron Company would have to take back any machinery or they would not get anything. That is not the testimony. I want this record correct.

The REFEREE.—Objection sustained.

Q. Well, at the time of this conversation that you have related, where were you?

The REFEREE.—The witness stated he didn't have any money—

Mr. CRENSHAW.—He told him he couldn't pay it, I believe he said.

Mr. WHITAKER.—That is correct.

Q. What did Mr. Sands say when you told him that you could not pay him?

A. He said he would take it back.

(Testimony of Edson France.)

Q. How did he happen to say he would take it back?

A. I made a proposition to him that we would return it to him. He said if they took it back to his store they would [35] give us credit on the amount.

Q. How much?

A. I don't remember the amount. I suppose it was \$2,000 or \$2,500, somewhere along there.

The REFEREE.—You didn't understand that question. You said less—

Mr. CRENSHAW.—Yes, I understood him to say “less 25 per cent of what they bought it for.”

The WITNESS.—Yes.

Q. (By the REFEREE.) And you returned him about \$2,000 worth?

A. At the time, about \$2,000, and I think there was some returned a little later than that. He would not give us credit for the full amount on account of the pipe having been used. It was what they called second-hand, you know, if I remember, he said he would give us credit for the amount we paid, less twenty-five per cent.

Q. Did Mr. Sands know anything about whether the machinery was being used? A. I don't know.

Q. Did you tell him?

A. I could not say whether I did or not.

Q. Did you make any statement to him as to why you wished to return it to him?

A. I told him that we did not have any cash on hand at the time, and that we would have to do that.

(Testimony of Edson France.)

Q. Did you take this machinery and pull it out of the hole in order to return it to him?

A. It was there on the ground, I understand; I understand [36] it was piping up there which was not being used.

Q. Had it been used?

A. I could not say whether it had been or not.

Q. Well, did you tell him if it had been used or had not been used?

A. I don't think I told him either one, I don't know whether he knew or not.

Q. About the month of September was there a committee appointed by the stockholders for the purpose of going over the affairs of the Cleveland Oil Company—an expert accountant?

Mr. WHITAKER.—Objected to on the grounds that the books are the best evidence.

The REFEREE.—Objection overruled.

Mr. WHITAKER.—Exception.

A. I think it was in September.

Q. Who was the expert? A. Mr. Mushet.

Q. Do you know whether or not he made an examination of the books and affairs of the company?

A. He did.

Q. Was Mr. Sands around the office at any time, if you remember, while that report was being made?

A. I never saw him around there, I never heard them say anything about looking into the report.

Q. Do you know whether or not he was familiar with the fact that investigation was being made by the stockholders? A. I don't know.

(Testimony of Edson France.)

Q. He never said anything to you about it? [37]

A. No, he never mentioned it.

Q. Do you remember the date that you, as an officer of the Cleveland Oil Company, became involved with the Federal authorities?

Mr. WHITAKER.—We object to that as incompetent, irrelevant and immaterial for the purposes of the hearing before the master and referee.

Mr. CRENSHAW.—The purpose is simply to show the date, and then I want to ask the witness if Mr. Sands knew anything about that.

The REFEREE.—I think it is a proper question. Objection overruled.

Q. What do you know about the date?

A. It was in the last of December or first of January. Somewhere around in there.

Q. (By the REFEREE.) December, 1910?

A. December, 1910.

Q. Well, did you ever see Mr. Sands about that time with reference to the affairs of the Herron Company?

A. I don't remember seeing him after that time. I don't have any knowledge of talking with him.

Q. Do you know anything about the market price of the stock of the Cleveland Oil Company, during the summer of 1910 and the fall, as listed on the exchange?

A. I could not give you any figures now.

The REFEREE.—Answer yes or no.

A. No, I could not give any exact figures.

(Testimony of Edson France.)

Q. Do you know approximately what the figures were?

MR. WHITAKER.—We submit, Mr. Referee, that the market [38] report would be the best evidence.

The REFEREE.—He could not state what they were, but just state yes or no. If you know what those quotations were say “yes” or if not, say “no.”

A. No, I do not.

Q. Do you know what the stock was selling at in September, 1910, on exchange? A. No.

Q. Do you know what it was selling at in November? A. No.

Q. Are you able to identify the books of the Cleveland Oil Company? A. Yes.

Q. Will you look these over, the journal and the ledger?

(Counsel produces books.)

A. I can't identify this one here. (Witness indicates.)

Q. What does that purport to be?

A. It says “Cash-book.” I am not very familiar with the books. That one there (indicating) I don't remember seeing before.

Q. Well, is this the ledger?

A. Yes, these two ledgers, I remember those.

Q. Does this ledger here contain that Herron Company account? Will you turn it over and see?

A. Yes, it is right here (indicating).

Q. Can you tell by looking at this account of R. H. Herron & Company when the last credit was given to

(Testimony of Edson France.)
the Cleveland Oil Company?

Mr. WHITAKER.—I don't wish to be technical, but here is [39] a witness on the stand who has testified that he had nothing to do with the books, that they were kept by Mr. Batchelder; any outsider could tell when the last credit was made but the only person who could state whether that credit is on the true date or not is the person who kept those books, or under whose supervision they were kept.

Mr. CRENSHAW.—In view of the fact he is president of the company if he testifies he can do it—

The REFEREE.—He didn't say he could do it.

Mr. CRENSHAW.—I asked him if he could.

A. I could not.

Q. Now, isn't it true, Mr. France, that part of this last credit was given by the R. H. Herron Company which appears as of December 31st, the sum of \$300.00—I think it was a pump or some such machinery—

A. Two pumps.

Q. Isn't it a fact that those were returned after the time at which you became involved with the Federal authorities?

A. I think not. I should say no.

Q. Well, you are positive that no action was taken, or no arrests made of the officers of the Cleveland Oil Company until after January first?

A. I could not give you the dates.

Q. The question was December 31st.

A. I could not say what the date was, as I can't remember it, but it was the latter part of December or the first part of January. I have not thought

(Testimony of Edson France.)

about it for several months and I have forgotten.

Q. How many times did you see Mr. Sands during October and [40] November?

A. Oh, a few times; probably three or four times.

Q. Whereabouts did you see him?

A. I was at his office a few times, and then he was in our office, probably once or twice.

Q. What was the occasion of your going down to his office?

A. I was down to explain why we didn't pay him some money he had demanded.

Q. How strongly did he demand it?

A. He simply insisted he had to have it.

By the REFEREE.—What explanation did you give?

A. I told Mr. Sands we did not have any money at that time; that we had some of this piping up on the oil fields which we would turn over to him if he would take it.

Q. Well, at the time that you were having these conversations with Mr. Sands the company was in pretty bad shape financially, was it not?

Mr. WHITAKER.—We object to that as incompetent, irrelevant and immaterial, not binding upon the respondent to this citation and objection, unless it is shown to have been within the knowledge of the respondent, the R. H. Herron Company, the fact that is, that knowledge would not bind this defendant, or give him any grounds to believe that any preference was intended.

The REFEREE.—If the company was not insolv-

(Testimony of Edson France.)

ent there would not be any preference on the part of the company. Now, in order to determine the first question it may be shown whether the company itself was insolvent, if it was insolvent it might be deemed to have given a preference, but the [41] next question is, whether it was taken with the reasonable cause to believe that they were insolvent. The question is competent for the purpose of showing the first question, it is material to that extent. You may answer the question.

(Question read by Reporter.)

A. I would not consider it in very bad shape.

Q. Well, didn't you testify here a short time ago that there was practically no change in the assets and liabilities? A. I did.

Q. Well, do you consider your company in a bad shape by this schedule that you made out?

Mr. WHITAKER.—That is objected to as calling for a conclusion of the witness.

The REFEREE.—Objection sustained.

Q. How many times did you go down to Mr. Sands' office? A. Oh, two or three times, I think.

Q. What did you tell him when you went down there?

A. I went down to see Mr. Sands because he demanded money from us and I told him that we didn't have any money at that time, and I told him about the pipe that we had upon the Midway field, we would return to him.

Q. That was a voluntary suggestion on your part that you would turn back the pipe?

(Testimony of Edson France.)

A. Yes, it was.

Q. Did you put any price on it? A. No, sir.

Q. You were willing to take whatever he would give you?

A. Any fair price, anything that was reasonable.

Q. Well, at that time you owed a great many other debts [42] beside to R. H. Herron & Company, did you? A. Yes, sir.

Q. And did you make a similar offer to any of the other people? A. We did not that I know of.

Q. You didn't offer to give them any part of this pipe or pumps? A. No.

Q. Were they after their money?

A. Some of them were; yes.

Q. Did any of them sue you for their money about that time?

A. I think there was a suit somewhere about that time by somebody but I don't remember who it was.

Q. Isn't it a fact that the Alexon Machine Company sued you about that time?

A. That was a little later, if I remember right.

Q. How much later? A. I could not say.

Q. Isn't it a fact that in the later part of November that they brought a suit against you and had the sheriff in charge of your office for a couple of days?

Mr. WHITAKER.—We object to that as not binding on this respondent, and upon the further grounds that the record is the best evidence that the suit was brought.

Mr. CRENSHAW.—I want to show that the man was in charge.

(Testimony of Edson France.)

The REFEREE.—Answer the question.

A. I could not give the date, but a suit of that kind was brought. [43]

Q. That was before December 31st, was it not?

A. I don't remember the date, I think it was.

Q. Did Mr. Sands at any time intimate to you that he knew what was the condition of the Cleveland Oil Company? A. He did not.

Q. Did he ever threaten to sue the company?

A. Not to my knowledge.

Q. What made you so anxious to go down and see Mr. Sands and make a settlement with him that you should go down to his office on several different occasions and offer him this pipe back?

Mr. WHITAKER.—That is objected to on the grounds that it has been asked already several times and answered.

The REFEREE.—Objection overruled. Answer the question, subject to the objection—what was the reason for your anxiety in going down to see Mr. Sands.

A. Well, my brother being connected with the oil company, Mr. Sands said he was going to try to collect of my brother, W. A. France.

Q. He said he was going to collect it from your brother? A. Yes, sir.

Q. How did he say he was going to try to collect it from your brother?

A. Well, he said my brother said he was going to see that the bill was paid.

Q. Did he say why he was going to look to your

(Testimony of Edson France.)

brother instead of the Oil Company?

A. Mr. Sands said that my brother agreed to see that the bills were paid. [44]

Q. Did he intimate to you that he thought that there was a better chance to get it out of your brother than the Cleveland Oil Company?

Mr. WHITAKER.—That is objected to as incompetent, irrelevant and immaterial, asking for a conclusion of the witness.

The REFEREE.—Objection sustained.

A. Mr. Sands said that he was going to telephone or write to my brother to send a payment of a couple of thousand dollars on account.

Q. (By the REFEREE.) What did you say?

A. It was the time that we were talking about returning this pipe and things there, I told Mr. Sands that we would return this pipe.

Q. (By the REFEREE.) Give us the whole conversation as near as you can that you had with Mr. Sands at that time.

A. That is all my part of it. I don't remember anything more.

Q. (By the REFEREE.) What did you tell him about your reasons for not making the payment?

A. I told him we did not have the money in the treasury at the time.

Q. (By the REFEREE.) Did you tell him why you didn't have the money in the treasury?

A. The production had not brought in enough to pay him. We had other bills to pay, the payroll and other expenses.

(Testimony of Edson France.)

Q. (By the REFEREE.) Did you tell him you were selling stock? A. No.

Q. Did you tell him that you expected any remittances [45] from any source?

Q. Well, we had some oil in storage in the Kern field and we expected to sell that and get some money.

Q. Did you tell him that?

A. Yes, sir. I told Mr. Sands that they had had a fire down there—that we had about 10,000 barrels of oil in storage.

Q. (By the REFEREE.) What did you tell him about that oil in storage?

A. I told him as soon as we could get some money out of it we expected to pay it in part, to make a payment on account and on the notes.

Q. You say you had a fire?

A. We had a fire up there in which the refinery burned. It was where our oil was being taken, but did not belong to us.

Q. You didn't have any fire, then, of your own property? A. No, sir.

Q. And did not, therefore, tell Mr. Sands that you had any fire or loss at all. You just simply had oil in stock.

A. Yes, we had the oil up there and could not ship it on account of the refinery being burned down.

Q. What else did you tell him?

A. That is all that I remember at the present time. I can't think of anything more.

Q. How much of this machinery was purchased—all of it from the Herron Company, that you returned

GEO. E. WHITAKER
ATTORNEY AT LAW
STONER BLOCK
BAKERSFIELD, CAL.

July 24th, 1913.

James H. Deering, Esq.,
424 City Hall Bldg.,
San Francisco, Calif.

Dear Mr. Deering:--

Enclosed herewith please find reply brief of respondent in the case of Herron Company -vs- William H. Moore, Jr., et cetera. I received the same by mail this morning.

According to the order made by the Court we have ten days within which to file our closing brief.

Please give the matter your attention, and oblige,

Very truly yours,

W/JH

(Enc.)

G. E. Whitaker

(Testimony of Edson France.)

to them? A. I don't know.

Q. You don't know whether it was their goods that went back to them or other goods? [46]

A. I don't know, I could not say. I suppose it was bought from the Herron Company. I did not see it myself.

Q. Did you return all the machinery that you had on hand to them? A. I could not say.

Q. Well, didn't you make the deal with them?

A. I made the deal with them, and the man on the field was instructed to take certain things over to Mr. Sands' store, but I never knew what that was.

Q. Did you instruct him what to do?

A. We did.

Mr. CRENSHAW.—I think that is all.

Cross-examination.

(By Mr. WHITAKER.)

Q. Where do you reside, Mr. France?

A. 1737 West Adams Street, Los Angeles.

Q. How long have you been a resident of Los Angeles? A. About two years.

Q. When did you first become interested in the Cleveland Oil Company as a stockholder, approximately. A. About July the 16th or 17th, 1910.

Q. And immediately after that you were elected to the directorate, or appointed? A. Yes, sir.

Q. In what capacity, sir?

A. As treasurer and vice-president.

Q. The books of account of the corporation were not kept by you or under your supervision, were they? [47] A. No.

(Testimony of Edson France.)

Q. And any report you may have signed was simply signed upon the statement made to you by your subordinates or the person having charge of that particular work. A. Yes, sir.

Q. And you accepted it as correct?

A. Yes, sir.

Q. Now, you say that you talked with Mr. Sands about three or four times in regard to the account of the Herron Company? A. I did.

Q. And during those conversations you stated that the property at present was not producing sufficient to more than pay certain small debts and labor claims? A. Yes, sir.

Q. And you also informed him that your company had about 10,000 barrels of oil in storage and which you were unable to dispose of at that particular time?

A. Yes, sir.

Q. And therefore at that time there were no funds in the treasury sufficient to meet these obligations?

A. Yes, sir.

Q. And you stated to him, I believe, that the company would return to the R. H. Herron Company a string of pipe which it had in the field and was not using? A. Yes, sir.

Q. And Mr. Sands said he would allow you the reasonable value of credit, which he said was 75 per cent of the stock price? [48]

A. That is as near as I can remember.

Q. And the transaction was consummated in that manner? A. Yes, sir.

(Testimony of Edson France.)

Q. And so far as you know this string of pipe had originally been purchased from the H. R. Herron Company? A. Yes, sir.

Q. And later on, certain pumps, two in number, were returned to the R. H. Herron Company?

A. Yes, they were returned.

Q. Now, the pumps, where were they purchased originally, so far as you know?

A. Well, I don't know anything about the pumps.

Q. During the month of September, 1910, I think on the 15th day of September, \$2,000.00 was paid to the R. H. Herron Company by the Cleveland Oil Company—so far as you know was or was not that money paid to the company on some indebtedness in the ordinary course of business?

A. It was, so far as I know.

Q. Now, did your company do any business with a firm known either as the National Supply Company or the California National Supply Company?

A. I think they did.

Q. Do you know whether any material was returned to the California National Supply Company and accepted by that company in the same manner?

A. Not to my knowledge.

Q. Not to your personal knowledge. Now, did Mr. Sands ever state to you that he would like to have his money paid or notes paid when they became due? [49] A. Yes, sir.

Q. And at one time he said, I believe you so stated to counsel, that he would have to call upon Dr. France who had in some way or other guaranteed the

(Testimony of Edson France.)

account? A. Yes, sir.

Q. And you have now stated practically and substantially the conversation between yourself and Mr. Sands, you representing the Cleveland Oil Company and Mr. Sands representing the R. H. Herron Company? A. Yes, sir.

Q. And you think these federal proceedings were instituted some time after the first of January, 1911?

A. I am not sure about that, whether it was in December or January.

Q. Do you know whether the company—of your own knowledge I am calling for, Mr. France,—was selling any treasury stock during either the months of September, October, November or December, 1910? A. Not to my knowledge.

Q. But the company was producing oil?

A. Yes, sir.

Q. It had ceased active drilling operations, however? A. Yes, sir.

Q. And was confining itself to production?

A. Yes, sir.

Mr. WHITAKER.—That is all.

Redirect Examination.

(By Mr. CRENSHAW.) [50]

Q. What was your production by day, do you know? A. I could not say.

Q. Approximately.

A. I could not give you any idea of what it was.

Q. You have no idea of what the company was producing?

A. I am not very familiar with the oil business

(Testimony of Edson France.)

myself. I was put in there to fill a vacancy for a short time.

Q. You say you had 10,000 barrels of oil on hand?

A. Yes, sir.

Q. Where did you have that?

A. We had it in storage up there.

Q. What was oil worth at that time in that particular place, do you know?

A. Well, the oil that we had was contracted for, I think at sixty cents.

Q. That oil was in storage? A. Yes, sir.

Q. Has it stayed there?

A. I don't know anything about it now.

Q. Who was it contracted to?

A. Warren Brothers.

Q. Was that the refinery that burned down?

A. Warren Brothers leased the refinery.

Q. Did you collect sixty cents a barrel for this oil that was sold to Warren Brothers?

A. At the time that is what it was contracted for.

Q. As a matter of fact they didn't pay that at that time? A. Not at that time. [51]

Q. Don't you know that they were to pay you less than sixty cents?

A. We were holding it for them in storage until they got a new refinery rebuilt, and I think at that time we had to make a new contract.

Q. Isn't it a fact that you were selling oil to them at less than forty cents?

A. We were to get sixty cents, so far as I can remember.

(Testimony of Edson France.)

Q. I believe you said that you told Mr. Sands as soon as you sold this oil you were going to pay him?

A. Yes, sir.

Q. You didn't have any idea of what the oil was going to be sold for?

A. Well, we sold it later to Warren Brothers, and on account of the refinery being burned down, and our needing some money I told Warren Brothers if they would give us sixty cents a barrel we would sell it to them.

Q. Well, did they take it?

A. Part of it and sent us a check.

Q. And paid you fifty cents a barrel for part of it?

A. Yes, sir.

Q. Do you remember how much they took?

A. I have forgotten just how much that was. I think it was half of it, 5,000 barrels; something like that.

Q. Do you mean to testify, Mr. France, that this schedule which you signed, that you didn't know what was in it?

A. I knew about it and looked it over. I would say it was correct so far as I could testify.

Q. You were familiar with the assets and indebtedness [52] of the company at the time?

A. Yes, sir.

Q. (By Mr. WHITAKER.) The value of these assets and liabilities were not placed by you on that sheet? A. No.

Q. Whom were they placed there by, if you know?

A. I presume they were taken off the books.

Mr. WHITAKER.—That is all.

[Testimony of Wm. H. Moore, Jr., for the Trustee.]

WM. H. MOORE, Jr., a witness produced on behalf of the trustee, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. CRENSHAW.)

Q. Mr. Moore, you are the trustee in the estate of the Cleveland Oil Company, bankrupt?

A. Yes, sir.

Q. And the assets of the company came into your hands? A. Yes, sir.

Q. Did you dispose of them?

A. Yes, sir; all that I could ascertain.

Q. Well, please state what you obtained for them.

A. In the neighborhood of about \$10,000.00, and that was entirely from oil that was produced on leases held by the Cleveland Oil Company. The leases themselves were valueless and went back to the lessors.

Q. Are there any assets except money in the hands of [53] the trustee?

A. Not at this time; no.

Q. Has any oil come into your hands as trustee?

A. About \$10,000.

Q. Have you sold it? A. Yes, sir.

Q. Do you remember what price you got for it?

A. Forty cents,—the market price.

Q. Have you got a list of the properties that came into your hands?

A. Well, I have various parts of my records. I

(Testimony of Wm. H. Moore, Jr.)

have not those records here, but I know approximately what came into my hands.

Q. Well, I will ask you if those were the properties. (Counsel produces document.)

Mr. CRENSHAW.—Mr. Whitaker, this is a copy, not the original schedule. Will you permit it to be used?

Mr. WHITAKER.—Oh, certainly, certainly.

A. Yes; those were the properties of the estate and there was some personal property on some of these leases.

Q. Now, you say those leases, you lost them; what did you mean by that?

Mr. WHITAKER.—No, he said they were valueless.

A. There was a lease from the California Kern Oil Company which came into my possession and I took possession of the land and continued the pumping of oil for a little while, but could not do it profitably; and the California Kern Oil Company took proceedings, I think in this court, to cancel the lease on the grounds that the Cleveland Oil Company had not [54] fulfilled all the provisions of the lease. I don't remember now just what the provisions were that were not fulfilled, but I think it was the drilling of wells or else they had not paid the royalties.

A. I think that appears in the records in this bankruptcy proceeding.

Q. Did you pump any other wells?

A. The Volcan lease was the only lease on which the wells could be pumped profitably. I pumped

(Testimony of Wm. H. Moore, Jr.)

those wells, and there was a suit pending at the time of the bankruptcy proceedings to declare that lease forfeited. That matter was brought into this court here for a cancellation of the lease, and after a hearing it was cancelled. None of the provisions of that lease have been fulfilled. That lease provided for a 25 per cent royalty, and it was of no value. Oil could not be pumped and sold for enough to pay the royalty and the expenses. It was subject to an \$83,500.00 bond issue outstanding. It was of no value at all to the estate, it was probably worth \$8,000.00.

Q. What was the value of the personal property that came to your hands, do you know?

A. Not to exceed \$3,000.00.

Q. Has it been disposed of?

A. Most of it went back to the companies that sold it and some of the things were attached.

Cross-examination.

(By Mr. WHITAKER.)

Q. Had you ever had any experience in the oil business prior to the time you were appointed trustee in bankruptcy [55] of the Cleveland Oil Company?

A. I had been trustee of other oil companies.

Q. Had you had any experience in the oil business prior to that time? A. Only as trustee.

Q. Does that involve the pumping of wells to any great extent?

A. Not to any great extent, but it covered that in each case.

(Testimony of Wm. H. Moore, Jr.)

Q. Do you know how much that property which was held under lease of the California Kern Company was producing per month? A. Yes, sir.

Q. How much? A. Less than \$1,000.00.

Q. Do you know how many wells they had on it?

A. I don't recall. I think it was about three or four.

Q. Was any defense made to that suit or did you permit it to go by default, the suit for cancellation?

A. I had to let it go.

Q. I asked you if you had made any defense or did you permit it to go by default.

Mr. CRENSHAW.—I think the record will show that.

The REFEREE.—Answer yes or no.

A. I don't know the defense; that is a question of law.

Q. As to the lease held by the Volcan Company, was that contested or let go by default?

A. Very vigorously contested.

Q. You say that the Volcan Oil Company lease could not [56] be operated at a profit?

A. Not and pay the royalty.

Q. Don't you know, as a matter of fact, that the Volcan Oil Company subsequently leased that property to the Midway Field Company, that they are pumping and operating it?

A. No, I don't know anything about it. I know that the wells are now being pumped. I don't know who is doing it.

Q. Do you think that they would pump them at

(Testimony of Wm. H. Moore, Jr.)

a loss? A. I don't know anything about it.

Q. Did you make an examination of the books of the corporation after they came into your possession?

A. No books or papers of any kind of the company ever came into my possession.

Q. No stock books? A. No record of any kind.

Q. Did you make any inquiries for them?

A. Yes, sir.

Q. And you were unable to find them?

A. I found out where they were.

Q. Did you ever get them?

A. They were in possession of the Postal Inspectors and they refused to turn them over.

[Testimony of W. C. Mushet, for the Trustee.]

W. C. MUSHET, a witness produced on behalf of the trustee, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. CRENSHAW.)

Q. Were you employed by representatives of the Cleveland [57] Oil Company to investigate the books of the company?

A. I was employed by a committee representing the stockholders to make an investigation of the books.

Q. About what time was that, do you know?

A. We made it in October, I think, 1910; the report was dated November 21, 1910.

Q. Did you examine their books and go into their

(Testimony of W. C. Mushet.)

affairs? A. I did, sir.

Q. Did you make a report? A. I did.

Q. From an examination of their books and from the notes you took, can you tell what their total indebtedness was at the time of your examination as appears in the books?

A. I cannot from memory. I probably could from this copy of the report.

Mr. WHITAKER.—We have no objections.

The REFEREE.—Examine it and answer the question.

A. It is eighteen months since I saw this report, and I went into the matter very thoroughly at that time.

The REFEREE.—You are asked for a statement as to the liability.

A. The liability, outside of the liability to stockholders and bondholders, is in the neighborhood of \$57,000 or \$58,000.

Q. What was the total amount of obligation on bonds, if you can tell, at that time?

A. About \$87,000. The bond issue was \$100,000 and there seemed to be \$13,000 unissued, which would make about \$87,000 issued. [58]

Mr. CRENSHAW.—That is all.

Cross-examination.

(By Mr. WHITAKER.)

Q. Is that the report or a copy of it?

A. It seems to be a copy of the report, sir.

Q. Let me have it, please. (Counsel examines document.)

(Testimony of W. C. Mushet.)

Q. Now, about when, if you know, have you any record, if you don't know of your own knowledge at this time, it being eighteen months ago, when you commenced work on the books?

A. I believe it was in October, 1910.

Q. What time in October?

A. I could not tell you; probably in the early part of October.

Q. And it took you approximately two months to make this report?

A. I should think it would; of course that was eighteen months ago.

Q. Have you any memoranda in your possession that would show?

A. Yes, I can tell you the day and the hour.

Q. Can you bring that to the referee this afternoon so we can have it in the record?

A. Yes, if the referee so orders.

The REFEREE.—Very well, Mr. Mushet, have that here this afternoon.

Q. I notice this report is addressed to "Philip L. Wilson, Esq., Chairman of Stockholders Committee, Cleveland Oil Company, Los Angeles, Cal.," and is dated Nov. 21, 1910. You say that it was about that time that you delivered this [59] report or a copy of it to Mr. Wilson?

A. Either the day or the following day.

Q. At any rate, no other report was made prior to November 21st by you to the stockholders or to the Committee appointed? A. No, no.

Q. I call your attention, Mr. Mushet, to page 47

(Testimony of W. C. Mushet.)

of your report which contains the following item: Volcan royalty paid, \$2,555.69; California Kern paid, \$1,138.04—did the books of the corporation, the Cleveland Oil Company, when you examined them at that time, show that these amounts had been paid on account of royalties to those respective companies?

A. I cannot recall. I might be able to tell from the report.

Q. There is the report, sir, page forty-seven, about the center of the page.

A. I think they probably paid it, but I want to be sure before I answer the question. (Witness examines document.)

A. Yes, I should say that \$2,555.69 was paid to the Volcan Oil Company and \$1,138.04 was paid to the California Kern Company.

Q. As a matter of fact, the books show that, and you made that report.

A. I made this report showing this among the credits. I don't know; I can't remember. It is probably in money but I would not swear to it.

Q. There is the word "Paid."

A. It is the word "Paid"; yes. I would like to be very definite, but I have had so many things in between, that and [60] this, that it is pretty hard to remember.

Q. I presume your figures are absolutely correct—can you indicate where you have obtained the assets?

A. No; that is something I could not do. I had to take the book figures on account of assets.

(Testimony of W. C. Mushet.)

Q. Did you take the book figures?

A. Well, yes, on September 30th.

Q. State what they show, will you please?

A. Cash on hand—this is prior to September 30, 1910, this is the statement that I referred to in speaking of the assets and liabilities, aside from the bonds on September 30th, 1910—cash on hand \$129.26. It shows oil properties and leases, \$253,-163.05; and then it shows the development in different companies, \$172,852.35; the France Midway cook-house, \$1,521.51; office furniture and fixtures, \$770.92.

Q. Anything else?

A. I think that is about all. I think that is about the credit—you see the value of those things I don't know.

Q. So that any person who inspected the books on Sept. 30, 1910, would find these apparent assets set forth on the books? A. Yes, sir.

Q. Did you make any attempt at all to verify the correctness of those figures? A. No, sir.

Q. You do not know whether the figures are the true value of the assets? A. No, sir. [61]

Mr. WHITAKER.—I think that is all, Mr. Mushet.

The REFEREE.—You can telephone that data to us, Mr. Mushet, as soon as you get back.

A. I will do it right away, sir.

Redirect Examination.

By Mr. CRENSHAW.—The report, Mr. Whitaker, shows that the returns from these different oil leases

(Testimony of W. C. Mushet.)

were taken from the books.

Mr. WHITAKER.—Well, I don't know; it may be. I have not looked at that.

Q. Could you tell from the report what the books show to be the returns from the different oil leases?

A. That is pages 11, 12 and 13—well, which particular lease do you want—the York Syndicate?

Q. I would like to have them all to show the returns. Let me see, now; first give us the York Syndicate development and production.

A. That is on page 7. The book shows that the only sale of oil from this lease was in August, 1910, when 212.32 barrels were sold at sixty-five cents, producing \$138.00. There is \$138.00 in money received from that lease.

Q. The Volcan lease?

A. The books show sales from this lease as follows: amounting to \$13,062.53.

Q. For how much a barrel?

Mr. WHITAKER.—We will stipulate on behalf of the R. H. Herron Company that these reports may go in.

Mr. MUSHET.—I have a copy of it; this is an exact copy.

Mr. WHITAKER.—I am satisfied if Mr. Mushet says it is [62] a copy.

The REFEREE.—The copy will be received in evidence and marked Claimant's Exhibit 2.

Mr. CRENSHAW.—That is all for Mr. Mushet. Now, I would like to put Mr. Sands on the stand

and ask him a few questions before the adjournment at noon, as to some evidence I want to go into.

[Testimony of John M. Sands, for the Trustee.]

JOHN M. SANDS, a witness produced on behalf of the trustee, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. CRENSHAW.)

Q. Mr. Sands, what is your present position?

A. Manager of the R. H. Herron Company.

Q. And during the months of September, October, November and December, 1910, what position did you occupy? A. A similar one.

Q. Do you also do the credit work for the company? A. I do.

Q. And during those months were you engaged in those services for the company? A. I was.

Q. Do you read the Los Angeles daily papers?

A. I do whenever I have the time.

Q. Well, whenever you have the time—do you take a paper? A. Why, yes.

Q. At the time which one were you taking, in the fall of [63] 1910?

A. I take the Los Angeles "Times."

Q. The Los Angeles "Times"; do you generally read that?

A. Not invariably. I don't find the time to read it every day.

Q. You don't read it regularly?

(Testimony of John M. Sands.)

A. Not regular.

Q. Well, about how many times a week did you read the "Times"?

A. Well, that is difficult to answer, it is—I would say not one-half of the time.

Q. Well, did you look in the "Times" for notes on your business, the oil information, for instance?

A. If I was reading the paper I should look for that column.

Q. But you didn't read it but about one-half the time? A. That is all.

Q. And during the fall of 1910, I presume your habit was about the same?

A. I should think it was.

Q. Do you ever read the "Examiner"?

A. Occasionally.

Q. About how many days out of the week do you read the "Examiner"?

A. We were not taking the "Examiner" during this period to which you have reference.

Q. You didn't read the "Examiner" during that period? A. No, sir.

Q. Did you read the "Herald" during that period?

[64]

The REFEREE.—There was not any "Herald" during that time.

Mr. CRENSHAW.—The "Morning Herald" was going at that time, I think.

Q. I think that you testified on the proceedings here in this matter that you kept a press clipping-book down at your office; is that correct?

(Testimony of John M. Sands.)

A. I testified that there was cut out from different newspapers clippings which had reference to the oil business, and I further testified that at that time we didn't subscribe to a press clipping bureau. I wish, if it is possible here, to correct my testimony at that date. After giving my evidence here, I made inquiry and ascertained that at that particular time we were subscribers to the Dake's Clipping Bureau.

Q. Well, now, have you those clippings on file in your office that were sent to you by Dake's?

Mr. WHITAKER.—With reference, of course, to this particular company?

Q. Yes.

A. I doubt if they are, for the reason that where they had reference to a particular fact they are filed in and under its particular heading. For example, if it is the Cleveland Oil Company, it would have been under the Cleveland Oil Company heading.

Q. Well, have you got clippings of the Cleveland Oil Company in your office?

A. I have them here. I have here the clippings of December 20th; this is the first clipping that comes to my knowledge, of anything published so far as my records are concerned, [65] of the Cleveland Oil Company. I have reason to think that perhaps it is the first public record.

Q. I notice there are two clippings, one from the Los Angeles "Examiner" and one from the "Herald," both purporting to be the same date.

A. Yes, sir.

(Testimony of John M. Sands.)

Q. Are these the only clippings that you say that you saved?

The REFEREE.—He said that they are the first.

A. They are the first.

Q. Were these sent you by the Dake's Company?

A. I have nothing from Dake's. I don't know whether they made any reference to it at all in their report, but the reason I referred to the Dake's was that I prior testified here that we were not a subscriber to any clipping bureau and I have informed myself along that line and want to correct my testimony.

Q. You don't know whether they did send you any clippings or not?

A. I have no knowledge of it. The Dake's Clipping, well, they would not come before me; that would be cut out by someone in the office and if they had any reference to it they would be filed in that particular reference. If I ever had occasion to go to a particular file, sir, if I had occasion to go there, well, I would find it there.

Q. You have examined the files of the Dake' Clipping Bureau under the heading of Cleveland Oil Company?

A. No. You see, each day, if they come in and have reference to any particular company, you see, why I would not [66] see that clipping unless I had occasion to go to that file—

Mr. WHITAKER.—What counsel is seeking to find out is this: as to whether or not you had looked among the files of the Cleveland Oil Company and

(Testimony of John M. Sands.)

found any other clipping except those.

A. None other; those are all that were in the files.

Q. (By the REFEREE.) And all the other clippings that do not refer to any particular case are destroyed? A. Yes, sir.

Mr. CRENSHAW.—I would like to introduce these in evidence.

The WITNESS.—I wish to explain that while I have testified as to the “Times,” the “Times” is the paper that I read, and the only one that I subscribe for, and so with the other clippings from some other paper, it must be that somebody else takes that paper, and clipped those out.

Mr. CRENSHAW.—I do not understand that you clipped these yourself.

The REFEREE.—The clippings will be marked Trustee’s Exhibits 3 and 4.

Mr. CRENSHAW.—Well, now, there is information I want to get. It is a question of evidence as to whether or not I will be permitted to introduce copies of the daily papers in evidence, and I would like to find out before the noon adjournment if it will be admissible as the only ones that we can get are in the library, and I want to avoid the inconvenience of bringing them here if they are not ruled to be admissible.

Mr. WHITAKER.—Do you desire now to make an offer? [67]

Mr. CRENSHAW.—Yes.

Mr. WHITAKER.—To which we object that such articles would be utterly incompetent, irrelevant and

(Testimony of John M. Sands.)

immaterial, not binding in any respect upon the R. H. Herron Company, the respondent to this citation, and especially not binding if it cannot be shown, and I think it is not shown that Mr. Sands, who is the witness on the stand at this time, read those papers and the articles contained therein relating to the Cleveland Oil Company.

Mr. CRENSHAW.—He has testified that he does read the “Times” but he could not remember on what date he had read it.

Mr. WHITAKER.—Why don’t you ask the question as to whether or not he remembers reading, outside of those clippings, any other item at all about that certain time, relating to the financial condition of the Cleveland Oil Company.

The REFEREE.—He may not want to ask him that question; he may not want to be bound by that.

Mr. CRENSHAW.—He said when he did read the “Times” he read about the Oil Companies.

The REFEREE.—I will ask you to state your purpose in the matter so we will understand it. It is right that you have introduced the daily papers with the purpose of charging him with notice.

Mr. CRENSHAW.—If there were articles in the paper, whether he had read them or not would put him on his guard or put a prudent man on his guard—cause him to investigate—it would be proper evidence.

The REFEREE.—Haven’t you got to show that those articles were called to his attention, not occasionally that he read [68] them, but that his at-

(Testimony of John M. Sands.)

tention was called to them or that he saw them, or had opportunity to read then, at least, not the casual reading of the newspaper.

Mr. CRENSHAW.—He testified that when he read the paper the oil notes were of interest to him in his business.

The REFEREE.—Well, he says that he read only half of the papers; is there any presumption that he read that one that you particularly called for? Have you got any authority on that?

Mr. CRENSHAW.—I could not find any authority on that question.

The REFEREE.—The objection will be sustained; no proper foundation laid.

Q. Well, I will ask you, did you ever read anything in any paper during the fall of 1910 and prior to December 20, 1910, in reference to any trouble about the Cleveland Oil Company.

A. I believe that the newspaper clipping which has been presented and marked "Exhibit 3" will answer that question.

Mr. WHITAKER.—That is not the question.

Mr. CRENSHAW.—This says it is the first public notice. A. Sure.

Mr. WHITAKER.—The question is, did you—that is what he asked—before that time, did you ever read anything in the newspaper about the Cleveland Oil Company?

A. No, sir, not to my knowledge.

The REFEREE.—Did you—yes or no?

A. Not to my knowledge.

(Testimony of John M. Sands.)

Q. Did anybody ever inform you that Mr. Mushet was making [69] a report to the stockholders?

A. Not to my knowledge; no.

Q. You didn't know that Mr. Mushet's investigation was being made by the stockholders' committee of the Cleveland Oil Company?

A. Not until it became public.

Q. Well, you did know it when it became public?

A. Of course I seen it in the paper.

Q. The question is whether you knew that Mr. Mushet was making the investigation.

A. Only as I seen it in the paper.

Q. Did you see that in the paper? A. Yes, sir.

Mr. WHITAKER.—You had better be specific about it, when you saw it.

The REFEREE.—The question is not what you saw, but whether you knew what he was doing there. Did you know that he was making an investigation?

A. I had no knowledge of it until it became public.

Mr. CRENSHAW.—He says he had no knowledge until it became public.

The REFEREE.—You asked him the question and I tried to make it explicit, did he have any knowledge that Mr. Mushet was investigating the affairs of the company for the purpose of making a report.

The WITNESS.—Not until it became public.

Q. (By the REFEREE.) Until what became public, the report of the fact that he was investigating?

A. Wait; I will have to think about that. I didn't charge [70] my mind with it. The only knowl-

(Testimony of John M. Sands.)

edge I had of it was by reading it in the newspapers. I cannot state that date, and that is what I meant by saying when it became public.

Q. Do you understand my question? It is, was it the fact that he was making the investigation that became public, or the report itself?

A. No, the report itself.

Q. (By the REFEREE.) That is what we want to know. Well, then, he made the report on the 21st of November, and that was made public at that time, prior to that time you didn't know anything about it?

A. Exactly.

Q. You didn't read anything in the paper to the effect that the stockholders' committee had been appointed to go into the affairs of the company?

A. Not until I seen it in that article—

Q. (By the REFEREE.) This was dated December 20, 1910? A. Yes, sir.

Q. Did you ever watch the stock quotations, did you get the stock exchange sheet down at your office?

A. No, sir.

Q. Did you ever watch the stock quotations?

A. I never did.

Q. Do you know what the stock of the Cleveland Oil Company was selling for?

A. I testified at the first hearing that I had no knowledge of what the stock was selling for, but in looking over the papers which are presented here, I find in one letter that I made reference as to what the stock was selling at. [71]

(Testimony of John M. Sands.)

Q. Can you produce that letter? (Letter produced by witness.)

The WITNESS.—I wish to add that I could not interpret the stock sheet if it was presented to me; that is why I testified as I did at my first hearing.

Mr. CRENSHAW.—We offer this in evidence.

Mr. WHITAKER.—No objection.

The REFEREE.—It will be Trustee's Exhibit No. 5.

Mr. WHITAKER.—I would like later on to withdraw these papers and file copies; they can be gone over either by yourself or Mr. Crenshaw.

Mr. CRENSHAW.—That will be satisfactory.

Q. At the time the officers of the Cleveland Oil Company were arrested by the United States Postal Authorities were you familiar with that, did you know about that?

A. Why, I knew that by reading it in the print.

Q. You saw that in the papers and read about it?

A. Yes, sir.

Q. (By the REFEREE.) Is this paper signed, is that Mr. Sands' signature?

Mr. WHITAKER.—Yes.

Q. Did you make an investigation of the affairs of the Cleveland Oil Company? A. I never did.

Q. Did they ever furnish you a statement?

A. No.

Q. Can you furnish for us the last credit that was given to the Cleveland Oil Company?

Mr. WHITAKER.—I think it is on the statement

(Testimony of John M. Sands.)

which is [72] already in evidence here, Mr. Crenshaw.

A. It was December first, 1910, credit for pump returned, \$300.00.

Q. Now, what was the last debit?

A. The last debit shown here was November 15, 1910, for \$2,607.43 which is—let me see what that was for. I believe I find the bill here; I may get it there. That was cash to protect the note.

Q. Can you tell from your statement here when was the last time that you sold them any goods and gave them any credit for it?

A. September 26th, 1910.

Q. (By Mr. WHITAKER.) How much?

A. On that day there was \$40. They were purchasing right along, nearly every day. Every few days that month and at least half of the days in August and it appears almost every day in July of the same year.

Q. What was the total of the purchases during the month of September, approximately?

A. \$65.54. In the month prior to that it was \$2,920.76.

Q. In July?

A. In July the merchandise purchased was \$3,547.23.

Q. You say September 26th was the last?

A. Yes, sir.

Q. Was the last day that they purchased any goods? A. Yes, sir.

Q. Do you know whether there were any more

(Testimony of John M. Sands.)

goods purchased by the Cleveland Oil Company from your company? A. The records do not tell. [73]

Mr. WHITAKER.—He is asking you if you know.
(Question read by reporter.)

Q. After September 26, 1910?

A. Well, I don't know. Perhaps I could ascertain by refreshing my memory in that regard.

Q. I will ask you to refresh your memory. Have you that correspondence?

A. Yes. Why, we considered at that time they *they* were owing us quite a considerable sum, and, of course, like other creditors, they reached the period where they should either increase or decrease. At that time, we thought that we had given them—that they were up to their limit of credit.

Q. Isn't it a fact that you practically cut off their credit on the last of August?

The REFEREE.—Mr. Mushet telephoned that he commenced work on the report, on the investigation, on the 26th day of October, and continued until the 21st day of November.

A. It was not. They were privileged to call at our store at Bakersfield, Taft and Maricopa and buy supplies for emergency requirements, and if they wanted anything in excess of the emergency requirement they were then to communicate with the Los Angeles office.

Q. Did they ever make any request for anything except emergency equipment after the last of August that you know?

A. I don't think that they asked for anything other

(Testimony of John M. Sands.)

than emergency requirements after that date. The reason was, perhaps, that they did not require it.

Q. Now, can you tell me at what time you did cut off [74] their credit except for emergency equipment?

Mr. WHITAKER.—I didn't understand, Mr. Crenshaw, that the witness has so testified. He has testified that they had local credit and any other credit they were to communicate with the Los Angeles office.

The WITNESS.—I can present this letter.

Mr. CRENSHAW.—Very well.

The WITNESS.—It is dated the ninth month and twenty-first day. That gives them orders for large requirements to call on the Los Angeles office.

Q. (By the REFEREE.) That is the notice that you gave? A. Yes, sir.

Q. (By the REFEREE.) Whom did you give that to?

A. That goes to the different stores, when men in the field make demand for supplies.

Q. (By the REFEREE.) What information did you have and act upon when you sent that letter?

A. None, other than the account itself.

Q. That is not a very large account, is it, for a prosperous oil company to be running?

A. It represents \$1,500.

Q. Well, at the time this letter was written—

The REFEREE.—Do you want to offer that in evidence, Mr. Crenshaw?

Mr. CRENSHAW.—Yes.

(Testimony of John M. Sands.)

The REFEREE.—It will be Trustee's Exhibit No. 6.

Q. September 21st, what was the amount of the account?

A. September 21st, I will tell you. It was just what it was, less the purchases in September; it would represent, of [75] course, \$14,750 in round numbers.

Q. Is that a particularly large account for an oil company which was doing a prosperous business?

A. Well, it is so considered.

Q. Don't you carry a great many larger accounts on your books than \$14,000?

A. Well, in cases where the property, or the assets of the company are more.

Q. Then you did know something about the assets of this company? A. From information gathered.

Q. What information was that, and where did you get it?

A. I seen their property in the Kern River field.

Q. You went up and looked at it yourself?

A. Yes; I went by the property, and they had quite a number of wells dug there. I don't recollect how many. They seemed to be in a very prosperous condition; they were all in where there were producing oil wells, and, in addition to that, at this particular time, this company had a lease on what was, and is, considered a very valuable piece of oil territory, as I understand it, in the Midway field.

Q. What lease was that?

A. I can't recall the section, but it was being oper-

(Testimony of John M. Sands.)

ated, I believe, under the name of the Cleveland Oil Company, if I recall correctly. I did not visit this Midway property, but if I recollect correctly it is in the same location as the property of the Buick Oil Company or in that neighborhood.

Q. Did you receive any information between the time that [76] you looked at the property and the 21st of September that they did not have that lease and would not operate that property?

A. I did not.

Q. In other words, when you wrote them this letter their company, so far as you know, was as prosperous as it was at any time in its existence?

A. To the best of my recollection and belief.

Q. And you considered it a prosperous oil company? A. I so considered it.

Q. But at the same time you withdrew the credit?

Mr. WHITAKER.—You are using a statement, or making a statement, which the witness has not testified, that they withdrew the credit, it was not that but that with large orders the Los Angeles office had to be first consulted, and I think we will show that that is the universal custom in all that country.

Q. Previous to this notice, how much credit was the Cleveland Oil Company permitted at your different stores?

A. Credits are determined under conditions of the account at the time the requisitions are demanded. You can't have in a credit department a letter issued in January that would provide for November, and I make mention of this to show you that it is custom-

(Testimony of John M. Sands.)

ary that there should be but one head to a credit department.

Q. I will ask you the question in a different way, previous to September 21st, where was this goods that was purchased by the Cleveland Oil Company, purchased?

A. Previous to September first the purchases [77] were at times made in Los Angeles and at other times in the field, if they were large requirements they generally were made in Los Angeles, because it is customary.

Q. Well, did they purchase goods of your stores in the field without consulting the Los Angeles office?

A. Under instructions from us at different periods.

Q. I see you limit them in this notice of September 21st to \$50. Did you ever place any limit on them before that time?

A. I would have to look over the papers to see.

The REFEREE.—Look and see.

A. I see here letter of date August 5th, where one of our managers writes in that he is delivering goods to the Cleveland Oil Company in small quantities almost daily and wanted to be advised when we expected a settlement from them. He states that the amounts are not large but have exceeded the \$100 named in your letter of the 22d, of the month prior.

Q. That is the 22d of July?

A. Yes; you wouldn't hardly think that the company—

The REFEREE.—Just answer the question.

Q. Your managers were delivered a notice about

(Testimony of John M. Sands.)

July 22d that they were to permit the Cleveland Oil Company to buy goods only to the limit of \$100 from the company?

A. No, it was asking for information.

The REFEREE.—He says, Mr. Sands, that there was a \$100 limit put upon it upon July 22d, have you got the letter of the 22d?

A. The next letter will show it—no, it is dated August 6th (reads): “Confirming our telephone conversation [78] of yesterday, you have the privilege of delivering the Cleveland Oil Company 1100 feet of 8 $\frac{1}{4}$ ” 28# casing. This is granted for the reason that they are to pay us its equivalent in cash to-day.” I won’t say whether we got the cash, we had the promise anyway.

Q. No cash after August, August 6th?

A. We didn’t get any cash after that until September 15th, so I can’t tell whether that is the cash that we were to get or not.

Q. Did they give you a note in August?

A. No, there is a note on the 22d day of August that we paid and charged to them. There is where we paid and charged (witness indicates) September 10th there was another note of \$4,000.

Q. What do you mean by you paid those notes and charged them to them?

Mr. WHITAKER.—I understand the witness means that when a company makes a note they put it in the bank and then when it becomes due, if the company does not pay it, they take it up and charge it back to the company; is that correct, Mr. Sands?

(Testimony of John M. Sands.)

A. Yes, sir.

Q. These notes, the first one was paid by you, you say, on August 22d?

A. I see one note was paid by us on August 22d.

Q. That was a note of the Cleveland Oil Company which was placed in the bank? A. Yes, sir.

Q. Do you remember what bank? [79]

A. No, I don't recollect.

Q. Have you got that note in your possession?

A. I have reason to believe it is filed here.

Mr. CRENSHAW.—Do those show that they have been deposited in banks?

The REFEREE.—Yes, they show the date of their payment.

Q. (By Mr. WHITAKER.) What was the amount of the note?

A. The amount of the note was \$2,911.17.

Q. Do you know whether or not the bank made any demand upon the Cleveland Oil Company for the payment of that note?

A. I could not tell you. I believe I cannot answer your question.

Q. I say, did the bank make a demand on the Cleveland Oil Company for the money?

A. I have no way of knowing this particular note.

Q. Were they placed in the bank for the purpose of the bank collecting them, they were put there for the purpose of collection, were they not?

A. Oh, yes.

Q. Why were they returned to you?

A. Because it was necessary to protect them.

(Testimony of John M. Sands.)

Q. That is just what I am getting at. Did the bank fail to collect them from the Cleveland Oil Company?

A. They must have, or they would not have made a demand upon us.

Q. Did they state their reason when they made the demand? A. No.

Q. But they would not have made the demand unless they had made an effort to collect them and had failed? [80]

A. I don't know what the bank's custom is of collecting its notes.

Q. Did you get the commercial report from Dun or Bradstreet?

A. We were a subscriber at this particular time to Dun's.

Q. Have you got any report in regard to the Cleveland Oil Company?

A. No, not to my knowledge.

Q. Have you those reports on file in your office?

A. They would be right here if we had any.

Q. (By Mr. WHITAKER.) In other words, what you mean is that if there were any reports relating to the Cleveland Oil Company it would be among those papers.

A. Yes, sir; so it is certain that they did not send us any.

Q. Did you ever get a report from any local company? A. No, I had no occasion to.

The REFEREE.—We will adjourn until 2 o'clock.

Mr. CRENSHAW.—Mr. Whitaker, during the in-

(Testimony of John M. Sands.)

terim, will you kindly bring the original notes of which these are copies? The referee would like to have them.

The WITNESS.—You have some originals and a lot of copies. [81]

July 24th, 1912, 2 o'clock P. M.

JOHN M. SANDS, on the stand.

Direct Examination Continued.

(By Mr. CRENSHAW.)

Q. Now, Mr. Sands, do you know what date those checks were returned? Can you tell from your letters?

A. I think from the records there—well, I have nothing here on file as to the date the notes were returned. It could be ascertained.

Q. You testified concerning it in your previous examination by stating the teamsters' bills would indicate that, and the teamsters' bills were made a part of the record.

A. You see later; I know the date shows here (indicating). But I can't find out from the index what dates show.

Q. Did you have any correspondence with your manager here?

A. That letter which is on file as an exhibit is the only letter I could find.

Mr. WHITAKER.—Look at this and see if it will refresh your memory. (Counsel produces letter.) I think this tells it exactly.

A. This is a letter from our manager at Taft. It says, "The Cleveland Oil Company returned the

(Testimony of John M. Sands.)

pumps of which you wrote this morning. One of them is pretty badly stripped of parts.” And so on—that is on November 25th.

Q. That was on November 25th? Then that credit which appears for the pump on December first is for those pumps written of in this letter? [82]

A. Yes, sir; yes, sir.

Q. The property that was returned about the 31st day of October and for which it appears they were given a credit of \$2,823.37, what was that?

A. That was the casing.

Q. That was the casing? A. The casing.

Q. And a payment was made on account to the R. H. Herron Company in September—

A. It was about September 15th, \$2,000.

Q. Do you know who paid you that cash?

A. I suppose—

Q. Was there any agreement between you and them to the effect that they would pay you the \$2,000 at that time?

A. Why, they had been promising cash for several weeks.

Q. Was the amount agreed upon, what they should pay at that time?

A. I am not positive concerning it. I believe that these letters which we have here indicate a certain sum of cash that they were to pay.

Q. Is that the money which was to come from Dr. France?

A. I can't tell where they got the money to pay this, but of course most of my assurances were from

(Testimony of John M. Sands.)

Dr. France, and whenever I would make a demand upon them, why that demand would naturally reach Dr. France.

Q. Did you have any correspondence with Dr. France about it?

A. I think there is some there among those papers. I remember of writing him. [83]

Q. Why did you go after Dr. France and didn't go after the company for your money?

Mr. WHITAKER.—That is objected to as incompetent, irrelevant and immaterial, the question as I understand it, and I think your ruling is absolutely correct on that, that this narrows it down to whether the Herron Company or Mr. Sands had reason to believe that he was receiving a preference at the time that these payments were made and that the company was not solvent. The mere fact that he had communicated with one of the members of the company who had strengthened the account by giving a personal guarantee would not affect the rights of the Herron Company in any way.

Mr. CRENSHAW.—It seems to me that it is more or less material as to why he should go after Dr. France and not attempt to collect his money from the company. Those reasons would throw some light on what he knew about the finances of the company.

Mr. WHITAKER.—To which we would answer, with all due respect to counsel, that if a man has a claim against a corporation and it is guaranteed by any person, he has a right to go after either one, and

(Testimony of John M. Sands.)

the fact that he goes after one cannot affect the liability of the other in any way. We will take a ruling, Mr. Referee, on that.

The REFEREE.—I don't see what difference it makes whether he should seek one or the other. If it was the other way—if the surety got a benefit, why it could be recovered just as much one way as another because the statute is that the person to be benefited is the one that recoveries may be had from. I don't see why, if a man has two persons [84] to go to and he chooses to take what he can from one, I don't see why that would show cause to believe that he was getting a preference.

Mr. CRENSHAW.—Isn't that a reason—wasn't there any reason why he should go after Dr. France instead of the Company—

The REFEREE.—He didn't go after Dr. France.

Mr. CRENSHAW.—I understood that his testimony was that he attempted to collect his money from Dr. France.

The REFEREE.—I didn't understand that.

Mr. WHITAKER.—He testified that he communicated with Dr. France with reference to getting this money, and that he had Dr. France's personal guaranty.

The REFEREE.—I understand that when the goods were sold that Dr. France had negotiated the sale, and that Dr. France said that he would see that the bill was paid, but I don't understand that after that this witness or the Herron Company ever made any demand on Dr. France for the money. Is that

(Testimony of John M. Sands.)

a fact? A. Yes, sir.

The REFEREE.—You never demanded of Dr. France the money at all? A. No, sir.

The REFEREE.—Objection sustained. Do you want an answer to your question?

A. No, I understood the witness to testify differently.

The REFEREE.—I see what you mean, but that is the way the testimony was.

Q. Well, now, all the communication you had with Dr. France [85] regarding this money was as an officer of the company and not on his personal guarantee?

The REFEREE.—Answer the question.

A. My communications are all addressed, I think, to Dr. France as president of the company and they are here, all my letters from him and to him.

Q. You had a written guarantee from him—

The REFEREE.—According to the testimony there is no liability upon Dr. France to him at all; it was an obligation so far as it goes here to see that it was paid.

Mr. CRENSHAW.—It shows no—

The REFEREE.—They had a written personal guarantee, according to this testimony.

Mr. CRENSHAW.—That testimony is not competent.

Q. Did you have a written personal guarantee from Dr. France? A. We did.

Q. On this account? A. We did.

Q. And you made no attempt to collect from him

(Testimony of John M. Sands.)

on account of the written guarantee?

Mr. WHITAKER.—Up to what time? I will state that after the company was adjudicated a bankrupt and long after that there was an attempt made.

Q. Up to the time of the adjudication?

A. I know that we wrote him as president of the company—I don't recollect—but the letters are here as evidence, everything that passed between us and we could soon arrive at a date by looking at these papers. [86]

Q. What time did you get that guarantee?

A. It was about the time that the company was formed. Just after the company was formed.

The REFEREE.—Have you got that guarantee there?

Mr. WHITAKER.—No, he has not the guarantee here, but I have no objection to the witness producing the guarantee. Where is that guarantee?

A. Judge Money, I may have given it to him.

Mr. WHITAKER.—He is not here.

The REFEREE.—Well, he is not in the city.

A. No, Judge Money is an attorney at Columbus, Mr. Helm.

Q. Do you know what the contents of that guarantee is?

A. I could not give the exact wording, although it was sufficient to guarantee what deliveries were made to the Cleveland Oil Company.

Q. It was not on your regular form?

A. No, sir, it was not on the regular form.

(Testimony of John M. Sands.)

Q. How long previous to this \$2,000 payment made on September 15th did they make you any payment of any considerable amount? Will you look at your sheet there?

A. Let me see; now, there is a cash payment on September 15th, 1910.

Q. That is the payment we are referring to, at least \$2,000.

A. Here is one, check 1869, to cover note due August 9, 1910, notes received \$1,500. No—I have got that wrong the date was August 6, 1910.

Q. How much? A. \$1,500. [87]

Q. Well, you carried on the negotiations with the officers of the Cleveland Oil Company in regard to this account and the payments made on them.

A. Yes, sir.

Q. Did anybody else take that up with them at all for your company? A. Not that I can recall.

Q. Whom did you have your negotiations with of the Cleveland Oil Company, what officer?

A. At times with Dr. France, and generally with him.

Q. With Dr. France? A. Yes, sir.

Q. Was he here in August and September?

A. I doubt whether he was or not from these notes.

Q. Well, when Dr. France was not here, whom did you take it up with?

A. Why, Mr. Thomas Montgomery and Mr. Batchelder.

Q. Well, when you went up to see about getting payment on this account, it was growing rather

(Testimony of John M. Sands.)

large; what did they tell you?

A. Well, they were expecting money soon.

Q. Did they say where from? A. No.

Q. Well, how soon after that did you get any money, after the conversation where they told you they were expecting it soon, can you fix the time?

A. Why, it could not have been very long, because there is payments here pretty nearly every month; it was quite an active account. [88]

Q. With reference to the return of the material, when did you first have a conversation with the officers of the Cleveland Oil Company concerning that?

A. I think it is prior, I think, to the delivery of it to us, and that was delivered in October.

Q. Did you accept that material because you thought you were getting a big bargain in getting it back?

A. Not at all. We accepted that material because it is quite customary to accept the return of second-hand material.

Q. Was the price you gave them credit for a good price for the material? A. It certainly was.

Q. You considered it a big price.

A. I considered it more than a fair price.

Q. More than you would have gone on the outside and taken it for?

A. I won't state that. I would consider it a fair price.

Q. Whom did you have the conversation with about taking back that material?

A. Why, Mr. France.

(Testimony of John M. Sands.)

Q. That is E. France.

A. Yes, E. France, and Mr. Batchelder was present at one time when I was talking to Mr. France about it. Most of my conversations were with Mr. France, although I recollect there were others present.

Q. Tell us how it arose, the proposition that you were to take that material, the circumstances.

A. They stated that they had no use for the material and would be very glad indeed if we would receive it as a credit [89] on account, if we could use it. I told him that we could use it at a price.

Q. Well; they told you that they could not give you the money?

A. At that particular date; yes. They didn't have the money; they were expecting money.

Q. Did they tell you how much they were expecting? A. They did not.

Q. They did not tell you how they were going to get it? A. They did not.

Q. Simply told you that they were expecting money? A. Yes, sir.

Q. Can you fix any date when you were up there?

A. I can safely say it was during October.

Q. It was during the month of October?

A. Yes, sir.

Q. How many times were you up there?

A. Two or three times at least.

Q. Did you notice when you were up there on those occasions during the month of October, or were you aware of the fact that Mr. Mushet was making an

(Testimony of John M. Sands.)

examination of the books?

A. I had no knowledge of that.

Q. You had no knowledge that the stockholders were investigating the account?

A. I had no knowledge of it.

Mr. CRENSHAW.—Did you find those letters to Dr. France?

Mr. WHITAKER.—There is quite an aggregation of letters here. Some refer to the France Oil Company and some to the [90] Cleveland Oil Company. I am trying to sort out those which refer to those dates. I was going to show them to the witness afterwards, they don't seem to be in chronological order.

Q. Mr. Sands, at the time you agreed to take back this casing, you didn't think this was a very good account, did you?

A. I always thought it a good account. I had no reason to feel otherwise about it.

Q. I said, did you still consider this a good account? A. I certainly did.

Q. When did you first commence to consider it a bad account?

A. I never considered that there was any question or doubt in regard to the account at all. That didn't come up, so far as that is concerned, until the trouble with the postal authorities—the bankruptcy proceedings.

Q. I believe you testified this morning you knew that their stock was going down very rapidly, the market value of it.

(Testimony of John M. Sands.)

Mr. WHITAKER.—No, he didn't testify; he said a letter which is in evidence.

Q. You were aware of the fact?

A. I think very likely I made reference to the value of the stock at that particular date. I never determine things by stock value in that way and I was quite surprised to see that I had mentioned it.

Q. Did you make any investigation at any time as to the properties the company had at that time?

A. Prior,—it was quite a while, anyway. [91]
As to their property in the Midway there.

Q. You saw the original property they started out with?

A. Well, yes, of course they kept improving those properties.

Q. Do you know what their daily or monthly production was at that time?

A. Every time I would, as I say, drop in and meet Dr. France, he would mention the production, just what it was during the previous month.

Q. Were you aware of the facts that the company declared a dividend in July or that they passed the dividend? A. No, I had no way of knowing that.

Q. Did you have any correspondence or were any matters taken up through letter?

A. On what subjects?

Q. Any of these negotiations carried through correspondence.

A. You mean about the return of these goods?

Q. And the payments on their account during the last few months?

(Testimony of John M. Sands.)

A. Well, if I had, the letters are here present, every letter we have.

Mr. CRENSHAW.—I think that there was a letter this morning that we were looking for, dated some time in July, instructions to his manager at Moron.

Mr. WHITAKER.—I can't find that letter, Mr. Crenshaw. Here is the letter of August 6th, Mr. Crenshaw, addressed to his manager; it has a little bearing on the question you are asking about. [92]

Mr. CRENSHAW.—I would like to introduce that in evidence.

Mr. WHITAKER.—No objections.

The REFEREE.—It will be Trustee's Exhibit No. 7.

Q. Do you know the occasion of your writing that letter?

A. Yes, it stated that they were owing us about \$20,000.

Q. Did you ever make any inquiry? Did you place these in the bank yourself?

A. Yes, these notes indicate that they have been discounted.

Q. I say, did you place them in the bank yourself?

A. Oh, yes, we discounted them.

Q. At the bank? A. Yes, sir.

Q. And they were guaranteed by you?

A. Oh, yes.

Q. Did you try to discount them at the bank without your guarantee?

A. Why, it is necessary, you endorse a note, you

(Testimony of John M. Sands.)

guarantee it to the bank. Some people endorse them without recourse.

Q. Did you endeavor to discount them at the bank without guaranteeing them?

A. Why, not generally; it is not customary to do like that. That is the form.

Q. It can be done occasionally and is done?

A. If the bank takes them.

Q. Well, these notes were returned to you directly after they became due.

A. Yes, sir; we had to protect these notes. I say, we had to protect them. They show on their faces what time they were [93] due, otherwise they would have been protested.

Q. What did you do when these notes became due—took it up with the Cleveland Oil Company?

A. Oh, yes.

Q. Did they give any reason for not paying their notes when they became due?

A. The only reason was that they had been disappointed in not receiving their money in time to protect these.

Q. They admitted the fact that they did not have the money to take them up when they become due?

A. Well, that particular date; yes.

Q. Did they say if the bank had brought them around a few days afterward that they would have got the money?

A. Well, I don't recall any such conversation.

Q. Did they ever give you any checks which were

(Testimony of John M. Sands.)

not good? A. No.

Q. Did they ever give you any checks which they paid at a later date?

A. No, they never gave me a check but what was good; always paid on demand.

Q. Did they give you any checks and ask you to hold them? A. They never did.

Q. Were all the moneys that were paid by them paid by check? That is, the larger amounts—I mean, were they paid by check?

A. To the best of my knowledge, this record will indicate just how we got the money every time.

Q. Will it indicate as to whether it was cash or not?

A. Yes, sir; you see that says “paid by check.”
[94]

Q. Now, I will show you this item of December 31st, “Cash to apply check #265.”

A. That is the number of their check.

Q. What does that wording mean?

A. Why, that means exactly what it states, that the cash represented by the check is credited to the account.

Q. That did not mean that they paid you cash to apply on a check that they had previously given you?

A. No.

Q. It might mean that, might it not?

A. Not in that way—

Q. Is that the particular form to say, “Cash to apply check”?

Mr. WHITAKER.—We object to that question.

(Testimony of John M. Sands.)

The REFEREE.—Objection sustained.

Q. Do you know what those words mean, can you explain it?

A. It means that it was cash represented by Check #265 that was credited to the account.

Q. Do you find any similar items on the account to that?

A. There is the same thing (indicating), “Cash on account interest on note.” Now, let me see—you see here (indicating) “Cash to apply \$2,000” and here “received check #1398 to cover.” Every man has a particular style of his own, for which you know I cannot be responsible.

Q. I understand that. Did you ever receive any checks from anybody else on this account, outside of the Cleveland Oil Company? Any personal checks, that you know of?

A. Not that I can recall. [95]

Q. Did Dr. France ever pay anything on it at all, personally?

A. Not that I can recall. If that is essential I would be glad to have my clerks look up the record and furnish it to you. I don't recollect it.

Mr. CRENSHAW.—Have you found the France correspondence yet?

Mr. WHITAKER.—I am getting it right now.

Q. I believe you testified this morning that you got no report from Dun & Company on the Cleveland Oil Company?

A. I testified there was none in this record and if there had been one it would have been in this record.

(Testimony of John M. Sands.)

Q. You didn't make any further search.

A. No, because that is the only record that we have; there was nowhere to search.

Q. Your Dun report would go in there if you had gotten one? A. Yes, it would have.

Q. Did you ever request from Dun & Company a special report at any time on the Cleveland Oil Company? A. Not to my knowledge.

Q. Then, at the time that these notes were not being paid at the bank, you didn't make any investigation of the affairs of the Cleveland Oil Company?

A. These notes, if you follow the records here closely, I believe you will find each and every note had a good and substantial payment thereon and that the account was active; it was not a dead account. They were buying goods right along.

Q. Along here in August, they owed you about \$20,000, didn't they? [96]

A. They did when I wrote that letter. I don't know what the date is.

Q. Isn't it a fact that most of these notes were due after August?

A. Here is a note due in November; and this is another one, due four months after June 23d; and another one four months after May 23d; and another ninety days after May 23d.

Q. What is the total amount of payments received on those notes? Does it show?

A. It shows that casing was returned that was credited on the note due August 21st and then there was a payment in cash as well, September 15th, that

(Testimony of John M. Sands.)

was to apply on the note due September 10th.

Q. Was there any other casing returned?

A. No, that is all of the casing that was returned to us. As I remember it, there was some other casing in the field; what became of it I don't know. I know this, that in talking with our man in the field at the time, he stated that there was some in the field that we could not use to advantage. I said, "Well, we won't buy what we can't use to advantage." What became of that casing that we could not use to advantage I don't know, we credited up just such casing as was hauled to us, and we paid for the hauling.

Q. Did you ever ask of the Cleveland Oil Company any security for any notes? A. No, sir.

Q. You considered, however, that you had security in Dr. France's guarantee? [97]

A. I considered that we had security in the property, and as an additional safeguard, we had Dr. France's guarantee.

Q. What particular piece of property was it that you considered valuable?

A. Their property in the Kern River field was, according to conversations I had with Dr. France, yielding good productions, and I have gone over the property that they had at the Midway field, and it had more than a prospective valuation; it was adjoining the Buick Oil Company property, which is one of the best properties, we understand, in the State; it joined that.

Q. At that time, the Buick was not producing, was

(Testimony of John M. Sands.)

it? A. I am not certain.

Q. As far back as 1910?

A. I am not certain as to whether it was producing oil or not. Just at that particular time, I don't know whether those wells were producing. The trend of development was in that direction and valuations were high in that direction.

Q. Do you understand that as late as September and October, 1910, that they still had this valuable property up in the Midway field?

A. Yes; I knew that they had this property up there.

Q. Did you understand that they had a lease on it?

A. I was not certain as to whether it was a lease or whether they purchased it outright.

Q. About all you knew about it is what Dr. France told you about it?

A. Other than as to the location.

Q. I mean, he told you about the ownership of the company? [98]

A. Yes; but then I know as to its location. I consider the property valuable.

Mr. WHITAKER.—These are all of the letters pertaining to the Cleveland Oil Company. I would suggest that you keep them in chronological order, Mr. Crenshaw, because I am going to put them in evidence, every one of them.

Mr. CRENSHAW.—These old letters of 1909 are not material.

Mr. WHITAKER.—I think that they are very material. We are going to offer them, put them in the record.

(Testimony of John M. Sands.)

Mr. CRENSHAW.—You say all of these letters are going in, Mr. Whitaker?

Mr. WHITAKER.—Yes, every one of them.

Q. I will show you this letter, Mr. Sands, which is dated August 25th, the personal guarantee of W. A. France and G. G. Gillette, of a note for \$5,055.00. Please give me the circumstances of obtaining that guarantee from them. Why it was done?

A. This is an instance where they had asked for an extension. You see it states here clearly.

Q. Did you ever attempt to collect that note from Mr. Gillette, or was it paid by the Cleveland Oil Company?

A. Now, when that came due, December 31st, 1909, they paid \$3,000 on that.

Q. You mean the company?

A. It says, "cash to apply check #255." It must have been the company's check. Of course, I could easily ascertain.

Q. So far as you know, it was the company? Do you know whether the balance of the note was ever paid or not?

A. Yes, I can tell here in a moment. On February first, [99] they must have paid that according to that record. February 1, 1910, that record says that Check #1296 to take up note \$2,055.42, due February 28—and this note of February 28th is part of that note of December 31st, 1909, about which you inquired did we ever get the settlement.

Q. Mr. Sands, did you investigate the financial responsibility of Mr. France, at the time that you con-

(Testimony of John M. Sands.)

sidered this line of credit? A. I did.

Q. What did you find?

A. I found that he was a man of considerable means, considerable property; there is letters here from the president of a bank here in this city, Mr. M. J. Monette, telling what he thinks of Mr. France.

Q. Do you know, October first, 1910, the occasion of writing that letter?

A. I don't know the occasion, because it was written in Columbus, Ohio, and I was here.

Q. Do you know whether that is a reply to any letter you had written?

A. No, only just an acknowledgment on his part that he had been personally responsible up until that date, October first, 1910.

Q. Upon receipt of that letter by you, did you make any investigation of the affairs of the Cleveland Oil Company? A. No investigation.

Q. Notwithstanding the fact that he informed you that he would no longer be responsible and was not an officer? A. There was no necessity. [100]

The REFEREE.—That is not the question.

Q. Did you ever make any investigation of the affairs of the Cleveland Oil Company after that date?

A. No, not to my knowledge.

Q. Will you examine this letter, dated November 5th, 1910, addressed to you by W. A. France—does it recall to you the letter to which that was a reply, which is referred to?

A. Why, no; my letter of November 5th should be here.

(Testimony of John M. Sands.)

Mr. WHITAKER.—You have not got that, I looked for that.

Q. Do you remember the contents of that letter?

A. Why, I can't remember the contents of that particular letter, only I know that he would have only one occasion to write to me and that was as he was president of the company, and my arrangements had been made with him.

Q. Do you remember whether in that letter you said anything to him about his own responsibility for the debt?

A. I cannot recollect, because I have not the letter here.

Q. Well, did you at any time try to collect any money from him on a personal account?

Mr. WHITAKER.—We object to that as already asked the witness and answered, and I put in "prior to the time of the adjudication" and the witness answered, "No."

Mr. CRENSHAW.—It is simply for the purpose of checking the account; this letter may refresh his memory.

The REFEREE.—Answer the question.

A. Not to my knowledge.

Mr. CRENSHAW.—I think that is all.

Cross-examination.

(By Mr. WHITAKER.) [101]

Q. Mr. Sands, how long have you been the manager of the R. H. Herron Company in California, approximately? A. Seven years.

Q. And during all of that time have you had charge

(Testimony of John M. Sands.)

of the credits of the company? A. I have.

Q. During any of that time, did any of the district managers, either in Bakersfield, Taft, Maricopa or any other place in California, have any authority to extend large credit to any oil company without first being authorized by you? A. They did not.

Q. Was it, or was it not, the universal rule and custom and instruction that each of such managers was to communicate with you whenever any large order was placed in the store? A. Yes, sir.

Q. And is the order then followed or rejected according to your judgment? A. It is.

Q. And do or do you not notify the district managers accordingly? A. I do.

Q. I hand you a letter, dated February 18, 1909, to the R. H. Herron Company from J. L. Scott, and ask you if that contains the report that you received as to the company's holdings. A. I recognize that.

Q. Who is Mr. J. L. Scott?

A. He is our division manager in the Kern River district.

Mr. WHITAKER.—We offer this letter in evidence for the [102] purpose of showing the report that was made to the R. H. Herron Company by its local manager as to the properties of the Cleveland Oil Company, all holdings.

Q. Did you rely upon the accuracy and correctness of the information contained in that letter?

A. I investigated the field at the first opportunity as well.

Q. Just answer the question. Did you rely upon

(Testimony of John M. Sands.)

the correctness and accuracy of the information contained in that letter? A. Not entirely.

Q. Did you afterwards verify it? A. I did.

The REFEREE.—It will be Claimant's Exhibit 3.

Q. I now hand you a carbon copy of a letter dated Los Angeles, May 10th, 1910. I will ask you to state whose signature that is at the bottom.

A. Mr. Lyon's.

Q. Who is Mr. Lyon? A. Our secretary.

Q. Was he secretary of the company at that time? A. Yes, sir.

Q. So that, as early as May, 1909, you notified the Bakersfield office as follows: "Oil Well Supply Company, Bakersfield, Cal., Gentlemen: Do not deliver any large amount of supplies to the Cleveland Oil Company without first getting authority from this office. You may deliver to them the little things they need to an amount not over \$100 if they require it, but all purchases in excess of the \$100 specified [103] must be referred to this office." Was that in accordance with your usual custom? A. It is.

Mr. WHITAKER.—I am going to offer all of these at once.

Q. And that is the acknowledgment of the letter, is it, from your Mr. Scott? (Counsel produced document.) A. It is.

Q. Now, I hand you a letter, or rather a carbon copy of a letter dated at Los Angeles, Cal., June 26th, 1909, addressed to Mr. J. L. Scott, Manager, Oil Well Supply Company, Bakersfield, Cal., and ask you if that is your signature. A. It is.

(Testimony of John M. Sands.)

Q. Did you send that letter to Mr. Scott at the time, the original? A. I did.

Mr. WHITAKER.—We offer that as a part of this exhibit.

Q. Now, I hand you a letter dated Bakersfield, Cal., October 16, 1909, on the letter-head of the Oil Well Supply Company, signed Oil Well Supply Co., per W. C. Hill, and ask you if you received that letter on or about that date. A. We did.

Q. The letter being as follows (reads): “John M. Sands, Manager, Oil Well Supply Co., Los Angeles, Calif., Dear Sir: We learned to-day that the Associated Supply Company have attached the Cleveland Oil Company. The Cleveland Oil Company owes the Associated Supply Company approximately \$3,000. We got this information from their former superintendent, Mr. James Jones. We give you this for your information, and oblige. Yours truly, Oil Well Supply Company, per W. C. Hill.” [104]

Q. And subsequent to the date of that letter all of these sales were made to the Cleveland Oil Company by your company, under your instructions?

A. Yes, sir.

Q. I hand you a letter of three pages, dated from Columbus, Ohio, 12/23/1909, signed W. A. France. Do you know if that is the signature of Dr. France?

A. I recognize it as such. He states in there, “We have now eight producing wells and, as near as I can get at the facts, we are getting from 8,000 to 10,000 barrels of oil per month. We have been selling our oil as fast as we could produce it, and have sold some

(Testimony of John M. Sands.)

as high as 75 cents per barrel. We have just closed up a contract with some Boston people, who, I understand are very strong people financially, for the lease of our refinery for two years; also have contracted with them for 240 barrels of oil at the rate of 65 cents per barrel, which we are to furnish them at the rate of 10,000 barrels per month. This is to use in the refinery for making asphalt. Our refinery has a capacity of 500 tons of asphalt per month."

Q. What refinery did he refer to—the refinery owned by the Cleveland Oil Company?

A. It is one that we have a contract with.

Q. To purchase?

A. No, I think they had a contract for reduction.

Q. The Warren refinery? A. I think so.

Q. Did you believe the statement contained in that letter? A. I certainly did.

Q. And you relied upon that? [105]

A. Implicitly.

Q. Is that the letter which you wrote in reply to it? The other letter being dated Los Angeles, Cal., Dec. 28, 1909. A. That is my reply.

Q. I will ask you whether this letter was sent by you, the original of it, to your house in Taft. (Counsel produces document.) A. It was.

Q. Being of date "Los Angeles, California, January 11, 1910, Oil Well Supply Company, Taft, California. Cleveland Oil Company, Gentlemen: You are privileged to deliver the above company supplies to the amount of \$1500. For anything in excess of this amount, communicate with this office. They are

(Testimony of John M. Sands.)

owing us considerable money and they have not acquired the habit of discounting their bills, which is our reason for the limited credit. Yours very truly,
J. M. Sands.”

Mr. CRENSHAW.—I think we can save a lot of time. I will stipulate that you can put in these letters.

Mr. WHITAKER.—I simply want to get them before the referee.

The REFEREE.—If you want to call my attention to any others, you may read them.

Mr. WHITAKER.—I offer a letter from Dr. France of date January 17, 1910, to Mr. Sands—let me see—a letter of January 21st, 1910, to the Oil Well Supply Company, Bakersfield, Moron, Maricopa. That was a circular letter?

A. Yes, to those three stores.

Q. Instructing the three stores that further deliveries [106] of \$1,000 for the total three stores might be allowed to the company?

A. Yes, sir. We also offer a letter, dated Feb. 9, 1910, from W. A. France to John M. Sands; also letter dated Aug. 6, 1910, to John M. Sands from Oil Well Supply Company by George W. Church, dated at Bakersfield; also letter of Cleveland Oil Company dated August 6th, 1910, to Oil Well Supply Company, advising them of enclosed check for \$1,500. Likewise carbon copy of a letter from the R. H. Herron Company to the Cleveland Oil Company, dated August 10, 1910, advising the cancellation of the note for \$3,000; also receipt for \$1,526.23.

(Testimony of John M. Sands.)

Q. Now, this casing, Mr. Sands, which has been referred to, and is referred to in the letter of August 6th, 1910, from the Herron Company to the Oil Well Supply Company, was 1100' of 8 $\frac{1}{4}$ ", 28# Casing, and that was delivered by your company to the Cleveland Oil Company?

A. That is the casing that we received back, our casing that he had sold. That letter is giving them authority to deliver the casing.

Q. Was that casing delivered by your company?

A. I will have to look here and see, because I could not tell you.

Q. This letter of date August 6th, you testified in regard to it this morning?

A. I want to get it absolutely clear. May I read that letter?

Mr. WHITAKER.—Yes. (Witness consults document.)

A. My letter of August 6th calls for 1,100 feet of 8 $\frac{1}{4}$ " inch, 28# casing, and I see there was billed on August 10th, [107] 1,109 feet of 8 $\frac{1}{4}$ ", 36# casing.

Q. That is the same thing, is it not, with the exception that it is heavier? A. I think it is.

Q. How much does that amount to, that invoice?

A. Sixteen, eighty-six, thirty-two.

Q. Now, it was agreed that this should be paid for in cash, was it?

A. Yes; this says we are to have its equivalent in cash.

Q. Well, was it?

A. I will tell you in a minute—no.

(Testimony of John M. Sands.)

Q. It was not paid in cash, but that was the agreement? A. Yes, sir.

Q. Now, you did not receive any money according to your statement, until the 15th day of September, 1910, when you received \$2,000, I believe.

A. Yes, sir.

Q. Do you know whether that \$2,000 was intended to cover that casing?

A. It was intended to cover the casing; yes, sir.

Q. To which you have just testified?

A. Yes, sir.

Mr. WHITAKER.—We offer in evidence a note addressed to John M. Sands, San Francisco, dated Los Angeles, Cal., August 13, 1910, and signed by the secretary of the company.

Mr. WHITAKER.—Now, I call your attention, Mr. Sands, to a letter of date August 22d, 1910, and ask you who wrote that letter.

A. Mr. Lyon, our secretary. [108]

Mr. WHITAKER.—I think that is important, so I will read it. The letter is on the letter-head of the Oil Well Supply Company and is dated Los Angeles, Cal., Aug. 22d, 1910, addressed to Mr. John M. Sands, San Francisco, Calif. Dear Sir: Had a talk with Mr. Batchelder of the Cleveland Oil Company this morning. It seems that their refinery in the Kern River Field burned down Saturday and that they are having trouble in raising the \$1,700 necessary for the 1000 feet 8 inch casing for the Kern River Field. It seems that the National sent them a car of 8 $\frac{1}{4}$ " to the Midway Field and by mistake

(Testimony of John M. Sands.)

their superintendent unloaded it and hauled it out. You know we gave them 1000 feet there and the result is that they have 2000 feet too much in the Midway field and have none in the Kern River. They have not taken care of their note due today. We are simply giving you this information that you may be in touch with the matter. Very truly yours, R. H. Herron Company, Walter Lyon, Secretary.

Q. Now, do you know whether any of this casing, that is, this 1000 feet, was any of the casing that was later returned to you?

A. Why, such casing as was returned to us was such casing as was delivered.

The REFEREE.—That is not the question. He wants to know whether that particular casing was returned.

A. I could not identify it; I would not know it.

Q. What was the size of the casing that was returned to the company in October?

A. The size of it was $8\frac{1}{4}$ ", but I was trying to get the weight. There are so many different weights, and it is as [109] essential to know one as it is the other, I suppose. Well, I can easily ascertain by looking at the record; there is nothing in those papers which would show.

Q. At this time, you cannot state of your own knowledge what the size and weight of the casing was? A. I can state the size, $8\frac{1}{4}$ ".

Q. Do you know whether or not that had been used in any wells?

A. You mean that casing that was returned?

(Testimony of John M. Sands.)

Q. Yes.

A. The casing that was returned had been used; it was so reported to me.

Q. Where?

A. By the Cleveland Oil Company.

Q. Where was it used?

A. In the Midway field.

Q. And you allowed them a credit of 75 per cent of the original cost?

A. Yes, sir, 75 per cent of the original cost.

Q. I will ask you whether or not you ever had occasion to take that casing from other companies?

A. Yes; it is quite common.

Q. Have you frequently done so?

A. Quite frèquently.

Q. What is the actual amount allowed as a credit to the company, assuming that the casing is in fairly good condition?

A. Twenty-five per cent from the price of new is an exceedingly liberal discount.

Q. Is that fair as between both parties? [110]

A. Yes, it is fair between both parties.

Q. Now, I hand you a letter, or rather a carbon copy of a letter, addressed to J. L. Scott, District Manager, dated October 26th, 1910, referring to casing, as follows (reads): "Dear Sir: We haven't received any record of the casing that we arranged to have returned by the Cleveland Oil Company to the Taft store. Please advise promptly." I show you that letter and the date for the purpose of refreshing your memory about that. When was it that it

(Testimony of John M. Sands.)

was agreed that you people should take back that 8 $\frac{1}{4}$ inch casing and credit the company?

A. Some time during October.

Q. That is about as near as you can place it?

A. It is within five or ten days.

Q. Prior to October 26th? A. Yes, sir.

Mr. WHITAKER.—I offer that in evidence.

Q. I hand you a carbon copy purporting to be signed by the Cleveland Oil Company, by Edson France, treasurer, dated November 15, 1910, instructing the superintendent to deliver to Mr. J. L. Scott, your representative, the two pumps remaining on the property. Can you state whether the original was received by you about that time?

A. Yes, it was, because this is a copy of the original.

Mr. WHITAKER.—I offer that in evidence.

Q. And that is the letter stating when the pumps were returned, isn't it, Mr. Sands? A. It is.

Mr. WHITAKER.—We offer in evidence the letter written by Dr. France dated November 5th, 1910, on the paper of the [111] Cleveland Oil Company.

Q. I hand you a circular, purporting to be sent out by the New York Midway Oil Company of date December 20th, 1910, relating to the reorganization of the Cleveland Oil Company. I will ask you if you received that. A. I did.

Q. On or about that date?

A. Yes, it is dated December 20th—it may have been a day or two later.

(Testimony of John M. Sands.)

Q. It was on or about that time?

A. Yes, sir.

Q. Do you know where you received it from?

A. I can't— It came through the mail.

Q. Well, now, did you believe that that reorganization would be effected? A. I believed so.

Q. Did you have any reason to think to the contrary up to the time the adjudication in bankruptcy was made, namely, on February 20th, 1911?

A. I had no reason to think that they were in a state of bankruptcy until that time.

Q. I hand you a letter of date November 5th, 1910, signed W. A. France, and ask you if you received that in the due course of the mail about that date.

A. I did. [112]

Mr. WHITAKER.—I think I would like to read this (reads): "November 5th, 1910, Mr. J. M. Sands, c/o R. H. Herron Company, Los Angeles, California. My Dear Mr. Sands,—A letter from your company received November 5th. In reply would say I presume that it would be more satisfactory to have a talk with my brother in regard to the affairs of myself and the Cleveland Oil Company. It was for that reason that I did not communicate direct with you. I am making arrangements to get back to Los Angeles as soon as possible. I feel quite sure if I were there that we could make everything satisfactory. If it is not too much trouble would like to have a copy of the letter referred to in regard to my guaranteeing payment of certain debts of the Cleveland Oil Company. We do not want any extra ex-

(Testimony of John M. Sands.)

pense made, expect to do everything possible to satisfy you in regard to the claims which you have either against me or the Cleveland Oil Company. The burning of our refinery and the bad luck in getting down our well in the Midway Field has set us back a little, but we are now making arrangements so that in a short time we expect to be able to satisfy all of our creditors. Would be glad to have you communicate with my brother as he can explain the matter better than I can write it. Would be glad to hear from you at any time. Yours truly, W. A. France."

Q. Did you believe that statement was true and correct? A. I did.

Q. (By the REFEREE.) What date is that?

A. November 5th, 1910.

Q. And believed that the Cleveland Oil Company would [113] adjust its matters?

A. I did.

Mr. CRENSHAW.—I object to what the witness believes.

Mr. WHITAKER.—I think it goes to the gist of whether he believed that they are insolvent.

The REFEREE.—It is whether he had reasonable cause to believe.

Mr. CRENSHAW.—Yes, what a reasonable man would believe.

Mr. WHITAKER.—Well, of course I should have added that.

Q. Now, did you or did you not know, Mr. France, at that time the payment of fifty-two hundred dollars was made to you on the fifteenth day of Sep-

(Testimony of John M. Sands.)

tember, 1910, by the Cleveland Oil Company, that it was insolvent? A. Why, I did.

Q. That calls for yes or no.

(Question read by reporter.)

A. I believed that they were solvent.

Q. You did not know, then, that they were insolvent, if insolvent? A. I did not.

Q. Did you on or about the 26th day of October, the day you wrote that letter to your district manager in Taft in relation to the return of certain machinery, oil well casing which you had given them credit for at the rate of seventy-five per cent, on the purchase price, know that Cleveland Oil Company was insolvent, if insolvent? A. I did not.

Q. Did you at the time the two pumps were returned, which was November 25th, I think, 1910, and which you had agreed to [114] receive and credit the Cleveland Oil Company with, to the estimate of three hundred dollars, know that the Cleveland Oil Company was insolvent, if insolvent?

A. I did not.

Q. When you, Mr. Sands, received the two thousand dollars in cash which was paid to you by the Cleveland Oil Company on the 15th day of September, 1910, have reason to believe that any preference was intended to be given the R. H. Herron Company by such payment?

Mr. CRENSHAW.—Object to the question.

The REFEREE.—That is the thing we are trying to find out.

Mr. WHITAKER.—I have a right to ask that

(Testimony of John M. Sands.)

question, I think. Just to ask him whether he had. Of course I am aware that you have to find on that.

The REFEREE.—Is it right for the witness to decide that question himself?

Mr. WHITAKER.—He could not decide it, but I think he can state whether he had cause to believe it. I can leave out the word “reasonable.” I think I have a right to my answer.

The REFEREE.—Answer the question subject to the objection.

A. I did not.

Q. Did you when the casing was returned?

A. I did not.

Q. Did you when the pumps were returned?

A. I did not.

The REFEREE.—I suppose you make the same objection.

Mr. CRENSHAW.—Yes, sir.

The REFEREE.—The same ruling. [115]

Q. Did you have any knowledge of the financial condition of the company, Mr. Sands, up to the time that this report was published or the articles in the newspaper which have been introduced?

A. Not until Mr. Mushet's report was published.

Q. And that information, you got from this exhibit 3? A. Yes, sir.

Q. By the way, Mr. Sands; can you state whether or not the average credit given by your company to all of the oil companies is above or below fifteen hundred dollars?

A. Below fifteen hundred dollars.

(Testimony of John M. Sands.)

Q. Was the fact that you desired your local managers, and so instructed them, to curtail credit at certain periods, due to the fact that you considered the company bankrupt, or insolvent, or simply a business precaution according to your usual custom?

A. Just the usual custom and a business precaution.

Q. You, I believe, early in the commencement of the business with the Cleveland Oil Company, notified your manager at Bakersfield not to deliver over one hundred dollars' worth on their own responsibility on May 10th, 1909? A. I did.

Q. And were all large orders over that referred first to you? A. They were.

Q. Now, after you received this information October 6th, 1909, that the Cleveland Oil Company had been attached by the Associated Supply Company, for the sum of three thousand dollars, you still continued selling them goods? [116]

A. Yes, we sold them a great many goods after that date as evidenced by the records here.

Q. Now, after you had written that letter of July 22, 1910, I think that was the date, again instructing the local managers not to deliver goods over the sum of one hundred dollars, you sold them in the month of July, did you not, something over thirty-five hundred dollars? A. We did.

Q. And in the month of August nearly three thousand dollars? A. We did.

Mr. WHITAKER.—We offer these in evidence as one lot.

(Testimony of John M. Sands.)

The REFEREE.—It will be exhibit No. 4.

Mr. WHITAKER.—I think that is all.

The REFEREE.—Any redirect?

Redirect Examination.

(By Mr. CRENSHAW.)

Q. Mr. Sands, with reference to that account to which you were testifying, it shows all of the sales to the Cleveland Oil Company that you ever had with him? A. It does.

Q. There are none subsequent to the dates on that account? A. No, sir.

Q. Now, with reference to Mr. Mushet's report which you say you saw published. Do you remember what day you saw that?

A. I submitted this evidence. I notice that here. It was marked, I think, exhibit 2, to-day, and that was December 20th. [117]

Q. And you did not see any before that?

A. None. I think that was the first public record.

Q. But before that time, you knew that Mr. Mushet was making an examination of the books?

A. No, that was the first public record.

Q. Well, if it was published in the newspapers, before that, would you have seen it in the "Times"?

Mr. WHITAKER.—Object to his calling for the conclusion of the witness.

The REFEREE.—Objection sustained.

Mr. CRENSHAW.—I do not know about these newspapers. I think it is competent, for it shows a means of investigation; if he had investigated, he would have obtained information.

(Testimony of John M. Sands.)

The REFEREE.—He had a right to go to the books of the company, and anything that he could have gotten out of the books of the company he was chargeable with notice of.

Mr. CRENSHAW.—Unless the books—

The REFEREE.—I do not suppose that the newspapers could have found out any more than the books showed.

Mr. CRENSHAW.—I think that is all.

[Testimony of W. J. Batchelder, for the Trustee.]

W. J. BATCHELDER, a witness produced on behalf of the trustee, being first duly cautioned, and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. CRENSHAW.)

Q. You are a resident of Los Angeles? [118]

A. Yes, sir.

Q. How long have you lived in this city?

A. Four years.

Q. When were you first connected with the Cleveland Oil Company?

A. When it was incorporated.

Q. You were an officer of the company in the fall of 1910 during the months of August, September, October, November and December?

A. Yes, sir.

Q. What office did you hold? A. Secretary.

Q. Were you also treasurer? A. No, sir.

Q. There was a treasurer of the company?

A. Yes, sir.

(Testimony of W. J. Batchelder.)

Q. Are you familiar with its assets and liabilities?

A. More or less.

Q. Was there any particular change in the assets of the company between the 12th day of September and the date when it went into bankruptcy?

A. No, sir.

Q. Any important change in its liabilities?

A. No.

Q. Were you familiar with the R. H. Herron Company and the Cleveland Oil Company's account with them? A. More or less.

Q. Did you ever have any conversation with any of the employees of the R. H. Herron Company concerning that account? [119]

Mr. WHITAKER.—That is objected to, unless it is shown that the employee whom Mr. Batchelder talked with occupied a position of trust with the company, or were agents. He might have talked with a teamster.

Mr. CRENSHAW.—We will find out first whom he talked with; that is just preliminary.

The REFEREE.—Answer yes or no. A. Yes.

Q. Whom did you talk with?

A. Well, are you stating at a certain time?

Q. I mean during those fall months.

A. I will have to change that—no.

Q. Did you ever have any conversation with Mr. Sands?

Mr. WHITAKER.—You mean during those fall months?

Q. Commencing with the month of August?

(Testimony of W. J. Batchelder.)

A. I will have to change my answer back to yes.

Q. About when was that, if you remember?

A. In September or October.

Q. What was the nature of the conversation? Give the details of it to the best of your recollection.

A. I could not do that, because I did not have direct conversation with him. I recall his coming into the room, which was occupied by Edson France, the treasurer and myself, and consequently I could not help overhearing some of the conversation that took place.

Q. Can you give us that conversation, or the gist of it? A. I could not do it.

Q. You don't know what they were talking about?

A. It was in connection with money. [120]

Q. Was Mr. *France* demanding money from the company? A. Not to my knowledge.

Q. Do you know what he was doing up there?

A. We had an active account for oil well supplies, so it was in connection with that account.

Q. Do you know whether or not the account was very active in October?

A. I do not think it was very active in October.

Q. Is it not a fact that you were not buying anything in October from them, and didn't buy anything? A. No, not to my knowledge.

Q. Do you know whether you bought anything or not? A. I don't remember.

Q. Do you know whether or not your credit had been cut off? A. No, sir; I don't know that.

Q. Is that the only time that you ever heard any

(Testimony of W. J. Batchelder.)

conversation about this account?

A. With reference to those three months; that is all.

Q. Did you ever hear any conversation about the account before that time?

A. Yes, from the time that the company was incorporated.

Q. You handled it up to about what period?

A. I don't know what you mean by handling. I was secretary of the company. I was not handling it, not the accounts.

Q. Who had charge of the accounts, and most of the negotiations? A. The treasurer.

Q. Who was the treasurer?

A. T. M. Montgomery, before Edson France came out. [121]

Q. Do you know what date, or about what date, he ceased to be treasurer and Edson France went in?

A. He resigned early in January, 1910, and Edson France then was elected to take his place as representative of Doctor France, the president, and was treasurer of the company.

Q. Then, the R. H. Herron Company never consulted with you about these accounts during the fall months? A. They never did; no, sir.

Q. Did you ever pay them any money?

A. As secretary I signed my name to checks. The checks would be signed by the president, or treasurer, and countersigned by the secretary, and I was the secretary so I countersigned the checks and notes.

Mr. CRENSHAW.—I think that is all, if this witness did not have any conversation.

Mr. WHITAKER.—That is all.

Mr. CRENSHAW.—That is all of our case.
[122]

**[Statement of Account of Cleveland Oil Company
With R. H. Herron Company, July, 1910, to January 12, 1911.]**

John Eaton,
President of both Companies.

John M. Sands,
Vice-president and Treasurer.
R. H. Herron Co.

Prices subject to change without
notice.

Richard E. Small,
Secretary, R. H. Herron Co.
Transportation Company's Receipt
Constitutes Delivery. Our Responsibility
Then Ceases.

R. H. HERRON CO.
Affiliated with
OIL WELL SUPPLY CO.
of Pittsburgh, Penn.

Branches:
Bakersfield.
Coalinga.
Maricopa.
San Francisco.
McKittrick.
Oreutt.
Moron.
Sisquoc.

Address all communications to Oil Well Supply Co.

All remittances should be made to Los Angeles.

Los Angeles, Cal., Jan. 12, 1911.

Terms:

Monthly settlements are required on
all running accounts.

2% discount will be allowed for cash
payment on or before the 20th of
month, for purchases of preceding
month, except on Freight, Expense
Items, or Special Net Sales.

Interest will be computed at regular
rates after the last day of the
month following purchases.

Phones:

Sunset Main 8088

Home 10721

AT JUNCTION OF NORTH MAIN & ALAMEDA STS.

SOLD TO—Cleveland Oil Company.

SHIPPED TO

FROM—

YOUR ORDER—

STATEMENT.

OUR ORDER.

[123]

EXHIBIT #1.

1910.

July.	Open Account.....	\$3547.23	
August.	“ “	2920.76	
September.	“ “	65.54	6533.53

Feb. 4/11.	Charge on Casing returned Oct. 31, 1910, account cartage	143.00	
------------	---	--------	--

1910. 6676.53

Dec. 1.	Credit for pumps returned.....	300.00	6376.53
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EXHIBIT #2.

1910.

Aug. 21.	Note due, dated May 23, 1910, with 6% interest from date.....	2868.15	
----------	--	---------	--

Sept. 10.	Note due, dated May 9, 1910, with 7% interest from date.....	4052.79	
-----------	---	---------	--

Oct. 23.	Note due, dated June 23, 1910, with 7% interest from date.....	3198.31	
----------	---	---------	--

Nov. 15.	Note due, dated July 16, 1910, with 7% interest from maturity.....	2607.43	
----------	---	---------	--

12726.68

Oct. 31.	Casing returned amount \$2823.37 to apply on note due Aug. 21, \$2868.15 less interest to maturity. 43.02	2780.35	
----------	--	---------	--

\$2000.00

Sept. 15	Payment made to ap- ply on note due Sept. 10, \$4052.79 less interest to maturity. 94.50	1905.50	4685.85	8040.83
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14417.36

INTEREST.

Interest on July a/c	\$3547.23	Sept. 1 to Jan. 1, '11.	@ 7%	82.77	
“ “	Aug. a/c	2920.76	Oct. 1 to Jan. 1, '11.	@ 7%	45.86
“ “	Sept. a/c	65.54	Nov. 1 to Jan. 1, '11.	@ 7%	.76
“ “	Note due Aug. 21	\$2911.17	Aug. 21 to Oct. 31, '10	@ 7%	39.05
“ “	Note balance	\$87.80	Nov. 1 to Jan. 1, '11.	@ 7%	1.02
“ “	“ “	\$2147.29	Sept. 10 to Jan. 1, '11.	@ 7%	45.92
“ “	“ due Oct. 23	\$3198.31	June 23 to Oct. 23, '10	@ 7%	74.62
“ “	Note due Oct. 23	\$3272.93	Oct. 23 to Jan. 1, '11	@ 7%	43.30
“ “	Note due Nov. 15	\$2607.43	Nov. 15 to Jan. 1, '11	@ 7%	22.83
“ “	Principal	\$14417.36	from Jan. 1 to Jan. 12, '11	@ 7%	30.83
					386.96

[Letter Dated May 10, 1909, from R. H. Herron Company to Oil Well Supply Company, Bakersfield.]

Los Angeles, Cal., May 10, 1909.

Oil Well Supply Co.,

Bakersfield, Cal.

CLEVELAND OIL CO.

Gentlemen:—

Do not deliver any large amount of supplies to the Cleveland Oil Co., without first getting authority from this office. You may deliver to them the little things they need to an amount not over \$100.00, if they require it, but all purchases in excess of the \$100.00 specified must be referred to this office.

Yours very truly,

R. H. HERRON CO.,

Affiliated with the OIL WELL SUPPLY CO. of
Pittsburgh, Penn.

WALTER H. LYON,

Secretary.

WHL/McD. [125]

[Letter Dated May 11, 1909, from R. H. Herron Company to Oil Well Supply Company, Los Angeles.]

John Eaton,
President of both Companies.

John M. Sands,
Vice-president & Treasurer.
R. H. Herron Co.

Walter H. Lyon,
Secretary R. H. Herron Co.

Main Office:
Los Angeles, Cal.

Branches:
San Francisco, Cal.
Coalinga, "
Bakersfield, "
Orcutt, "
Maricopa, "
McKittrick, "
King City, "

Machine and Forge Works:
Los Angeles and Coalinga.

R. H. HERRON CO.

Affiliated with

OIL WELL SUPPLY CO.

of

Pittsburg, Pa.

Bakersfield, Calif., May 11, 1909.

Oil Well Supply Co.,
Los Angeles, Calif.

Gentlemen:—

We are in reply to your letter asking us not to deliver any more supplies to the Cleveland Oil Co. About an hour or two previous to our receiving this letter we had delivered to them 1000 ft. 3" Tubing and have on file at the present time an order for 1000 ft. more 3" Tubing also 1000 ft. $\frac{7}{8}$ " Imperial Rods.

We judge from the tone of your letter that you do not wish us to deliver these goods. We now have a call in for Mr. Sands and will possibly get him before your office closes this evening, if so we will explain this matter to him and will no doubt be advised as

to the course we shall pursue.

Yours truly,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO. of
Pittsburg, Penn.

J. L. SCOTT.

RECEIVED

R. E. Small

May 1 ———

Ans'd ——— Ref. to ———

A.M. 7/8/9/10/11/12 ———

[126]

[Letter Dated June 26, 1909, from R. H. Herron
Company to J. L. Scott, Manager Oil Well Sup-
ply Company, Bakersfield.]

Los Angeles, Cal., June 26, 1909.

CLEVELAND OIL CO.

Mr. J. L. Scott, Mgr.,

OIL WELL SUPPLY CO.,

Bakersfield, Cal.

Dear Sir:—

We are in receipt of your favor of the 25th. Have had a call in at the company's office for Mr. Montgomery, who represents Dr. France. I want to let him know that we understand the conditions at Bakersfield, and that would have a tendency to relieve the anxiety of the teamsters, for doubtless he will get busy and send in some cash. Mr. Gillette is in the East or we would take the matter up with him.

There are many instances where we can be of value

to a company as well as ourselves by passing on such information. Most companies appreciate a favor of this kind, and of course we always try to discern this before presenting the information.

For your own guidance, don't deliver them any goods to large extent until you are instructed from this office or until you have received notice that they have made a further cash payment.

Yours truly,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO. of
Pittsburg, Penn.

JOHN M. SANDS,
Treasurer.

JMS/EVM. [127]

[Letter Dated October 16, 1909, from Oil Well Supply Company to John M. Sands, Manager Oil Well Supply Company, Los Angeles.]

John Eaton,
President of both Companies.

John M. Sands,
Vice-president & Treasurer.
R. H. Herron Co.

Walter H. Lyon,
Secretary R. H. Herron Co.

Main Office :
Los Angeles, Cal.

Branches :
San Francisco, Cal.
Coalinga, "
Bakersfield, "
Oreutt, "
Maricopa, "
McKittrick, "
King City, "
Midway, "

Machine and Forge Works :
Los Angeles and Coalinga.

R. H. HERRON CO.

Affiliated with

OIL WELL SUPPLY CO.

of

Pittsburg, Pa.

Bakersfield, Calif., Oct. 16, 1909.

[In pencil:]

Jno. M. Sands, Mgr.,

1260.

Oil Well Supply Co.,

Cleveland Oil Co.

Los Angeles, Calif.

Dear Sir:—

We learned to-day that the Associated Supply Co., have attached the Cleveland Oil Co. The Cleveland Oil Co. owe the Associated Supply Co. approximately \$3,000.00. We got this information from their former superintendent, Mr. James Jones.

We give you this for your information, and oblige.

Yours truly,

OIL WELL SUPPLY CO.,

Per W. C. HILL. [128]

[Letter Dated December 23, 1909, from W. A. France
to John M. Sands.]

THE FRANCE MEDICAL INSTITUTE CO.

Chronic Diseases a Specialty.

Nos. 38 & 40 West Gay Street.

Established

1886

Telephone

2862

Columbus, O. 12/23/1909.

[In pencil:]

1260.

Cleveland Oil Co.

Jno. M. Sands, Vice-pres.,

R. H. Herron Company,

Los Angeles, Calif.

My dear Mr. Sands:—

I thought I would write you a few lines to let you know that I am still alive and doing business as usual. I arrived home November 1st. Since coming home, I have kept in touch with our oil properties in California almost as well as if I was at our office in Los Angeles; receiving a letter nearly every day from our Superintendent in the field, as well as from our office in Los Angeles. Things have been going along very nicely with us. We have now eight producing wells, and as near as I can get at the facts, we are getting from 8,000 to 10,000 barrels of oil per month. We have been selling our oil as fast as we could produce it, and have sold some as high as 75 cents per barrel. We have just closed up a contract with some Boston people, who I under-

stand are very strong people financially, for the lease of our Refinery for two years; also have contracted [129]

THE FRANCE MEDICAL INSTITUTE CO.

Chronic Diseases a Specialty.

Nos. 38 & 40 West Gay Street.

Established

1886

Telephone

2862

Columbus, O. 12/23/1909.

Mr. Sands—2.

with them for 240,000 barrels of oil at the rate of 65 cents per barrel, which we are to furnish them at the rate of 10,000 barrels per month. This is to use in the Refinery for making asphalt. Our Refinery has a capacity of 500 tons of asphalt per month.

We are now putting down two more wells; one on the Kern River field, and the other well, which you know of, in Midway. Everything seems to look very promising for our well in Midway. As you undoubtedly know, they have made some good strikes there within the past few weeks. I will enclose you a statement of the Cleveland Oil Co's. property, so that you can have some idea of our holdings.

The \$5,055.00 note which becomes due, I think January 1st, will be paid. I see that there is another note of \$3,691.88 of the France Oil Co., or W. A. France, on which I would like to have a little extension of time. I expect to be in Los Angeles sometime during next month. Money that has been raised for the [130]

THE FRANCE MEDICAL INSTITUTE CO.

Chronic Diseases a Specialty.

Nos. 38 & 40 West Gay Street.

Established

1886

Telephone

2862

Columbus, O. 12/23/1909.

Mr. Sands—3.

development of our property has nearly all been raised by myself. The \$5,055.00 which we promised you to pay without fail when due, I have sent to California, so that you will be sure of that note being paid.

Everything is going along very nicely with me; although it requires considerable money to get things started. As I presume you know, I am interested in the Bankers Oil Co., and own a fifth of it. We are starting to develop that property, and as I understand it, have started to drill four wells. All these things have kept me hustling around to get my matters in shape to get ready money. You need have no fears in regard to any claims you have against me or the Cleveland Oil Co.'s property, as we will get there if you will have a little patience with us.

I would be pleased to hear from you.

Yours truly,

W. A. FRANCE.

WAF/HM.

[In pencil:] 3691.88. Feb. 1st. [131]

**[Letter Dated December 28, 1909, from R. H. Herron
Company to Dr. W. A. France.]**

[In pencil:] 1260.

Los Angeles, California, December 28th, 1909.

Dr. W. A. France,
38-40 West Gay Street,
Columbus, Ohio.

Dear Mr. France:

Am pleased to receive your letter of the 23d inst. and am most interested in the report enclosed. It is very evident that you have valuable properties. Just at this particular time interest is being taken in the section near the California Midway and understand it will soon be in.

The contract that you have for sale of the oil with the Cleveland Oil Co. is a very good one. Mr. Montgomery was in the other day and wanted to renew \$2,000.00 of the Cleveland Oil Co. note due December 31st for \$5,055.00 and granted him the privilege of a sixty-day renewal for the \$2,000.00. At that time I was counting on the payment of the France Oil Co. note for \$3,691.88, which would be due on February 1st, but since the receipt of your letter, I conclude it is more agreeable to you to make payment in full of the Cleveland Oil Co. note, in which event we will grant you a sixty-day renewal of the France Oil Co. note which is to bear your personal endorsement. As the note of the France Oil Co. is not due until February 1st and as you have arranged to be in Los Angeles before that date, we will not send the

note to you for your personal endorsement as you will be on the ground to conclude the matter.

With kindest regards, we remain,

Yours very truly,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO., of
Pittsburgh, Penn.

JOHN M. SANDS,

Treasurer.

JMS/R. [132]

[Letter Dated January 11, 1910, from R. H. Herron
Company to Oil Well Supply Company, Taft.]

[In pencil:] 1260.

Los Angeles, California, January 11th, 1910.

Oil Well Supply Co.,

Taft, California.

Cleveland Oil Company.

Gentlemen:—

You are privileged to deliver the above company supplies to the amount of \$1500.00. For anything in excess of this amount, communicate with this office. They are owing us considerable money and they have not acquired the habit of discounting their bills, which is our reason for the limited credit.

Yours very truly,

R. H. HERRON CO.

Affiliated With the OIL WELL SUPPLY CO., of
Pittsburgh, Penn.

JOHN M. SANDS,

Treasurer.

JMS/R. [133]

[Letter Dated January 17, 1910, from W. A. France
to John M. Sands.]

THE FRANCE MEDICAL INSTITUTE CO.

Chronic Diseases a Specialty.

Nos. 38 & 40 West Gay Street.

Established

1886

Telephone

2862

Columbus, O., January 17, 1910.

Jno. M. Sands, Sec'y.

R. H. Herron Co.,

Los Angeles, Calif.

Dear Sir:—

Yours of the 11th received. I was very glad to hear from you, and to know that everything would be satisfactory in regard to the extension of time on the France note, if the balance of the Cleveland Oil Co. note, namely: \$2,055.42, was paid when due. I am not sure whether that note is due Feb. 1st, or March 1st, but I presume Mr. Montgomery will inform me.

I expect to be in Los Angeles sometime next month, and will be very glad to meet you and tell you all about our properties. I am investing a great deal of money at this time, and it keeps me on the move to keep things going.

Will be glad to hear from you at any time.

Yours truly,

W. A. FRANCE.

WAF/HM.

[In pencil:] Note Cleveland Oil Co. Due 2/28, 2055.42. Note France Oil Co. Due 2/1, 3691.88.

[134]

[Letter Dated January 12, 1910, from R. H. Herron Company to Oil Well Supply Company, Bakersfield, Moron, Maricopa.]

Los Angeles, Calif., Jan. 21, 1910.

Oil Well Supply Company,

Bakersfield, Moron, Cleveland Oil Company.
Maricopa.

Gentlemen:—

The amount of their open account is \$4,819.58.

In addition to this they owe us a note due on the 28th day of February for \$2,055.42, and another due on the 15th of February for \$6,617.66. We feel this is quite enough that is providing the information, which was given us by Mr. Scott when at Bakersfield the other day, is correct to the effect that they were owing considerable sums for lumber bills, and there were other creditors around for other small bills who were unable to get their money.

We would be glad to have a report from each representative to whom this is directed telling us as soon as possible regarding their holding in your respective district.

In the meantime we are going to permit you to make further deliveries of \$1,000.00. This does not mean for each special store, but \$1,000.00 for the three stores. So please keep in touch so as to see that the instructions are not in any way violated.

Yours truly,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO. of
Pittsburg, Penn.

JOHN M. SANDS,

JMS/HR. [135]

Treasurer.

THE FRANCE MEDICAL INSTITUTE CO.

Chronic Diseases a Specialty.

Nos. 38 & 40 West Gay Street.

Established

1886

Telephone

2862

Columbus, O., Feb. 9, 1910.

Mr. Jno. M. Sands,

c/o R. H. Herron Co.,

Los Angeles, Calif.

My dear Mr. Sands:—

We are arranging to put down three or four more wells on our Cleveland Oil Co. property in the Kern River field.

I have written Mr. Montgomery that if he could make the proper arrangements with you, and if you would do as well by us as any other firm, that it would greatly please me for us to do all the business with you that we possibly could; that I felt you knew something about my responsibility, and that I would sooner have our business confined to a few people rather than to divide it up among a half-dozen.

Would like to have you see Mr. Montgomery, and give him figures on the supplies which we will have to use within a short time.

We feel that we are getting things arranged here in the East so that we will get along and perhaps be able to pay our bills a little more promptly, but even if they are not fully paid up within 30 or 60 days, we feel that we can satisfy you that you are taking no chance in accommodating us as you have in the past.

Expect to be out there during this month. Will notify you as soon as I get to Los Angeles, as I am very anxious to see you and talk over our business affairs.

Yours truly,

W. A. FRANCE. [136]

[Letter Dated August 5, 1910, from Oil Well Supply Company to John M. Sands.]

[In pencil:] 1260.

John Eaton,
President of both Companies.

John M. Sands,
Vice-president & Treasurer.
R. H. Herron Co.

Walter H. Lyon,
Secretary R. H. Herron Co.

Main Office:
Los Angeles, Cal.

Branches:
San Francisco, Cal.
Coalinga, "
Bakersfield, "
Orcutt, "
Maricopa, "
McKittrick, "
King City, "
Midway, "

Machine and Forge Works:
Los Angeles and Coalinga.

R. H. HERRON CO.

Affiliated with

OIL WELL SUPPLY CO.

of

Pittsburg, Pa.

Bakersfield, Cal., August 5, 1910.

Cleveland Oil Co.,

Mr. John M. Sands, Manager,
Oil Well Supply Company,
Los Angeles, Cal.

Dear Sir:—

We are delivering goods to the Cleveland Oil Company in small quantities almost daily since our telephone conversation of a few days ago when you advised that you expected a settlement from them.

The amounts are not large but they have exceeded

the \$100.00 limit you placed in your letter of the 22d ult. This you will remember was done on your authority but we would like to be advised if we shall communicate with you should they want goods for any large amount now, say \$200.00 or over or shall we deliver same as before receiving your letter of the 22nd ult.

Yours very truly,
OIL WELL SUPPLY COMPANY,
Per GEO. W. CHURCH. [137]

[Letter Dated August 6, 1910, from Cleveland Oil Company to Oil Well Supply Company, Los Angeles.]

[In pencil:] 1260.

W. A. France, Pres. T. M. Montgomery, Treas.

Wm. J. Batchelder, Secy.

CLEVELAND OIL COMPANY,
426-427 H. W. Hellman Building.

Phones:

Home A8726

Sunset Bway 1732

Los Angeles, Cal., Aug. 6, 1910.

Oil Well Supply Co.,
Los Angeles, Cal.

Gentlemen:—

Enclosed we hand you check for \$1500 which please credit to our account, acknowledge receipt, and oblige.

Yours very truly,

CLEVELAND OIL CO.
By W. J. BATCHELDER,
Secy. [138]

[Letter Dated August 6, 1910, from R. H. Herron
Company to Oil Well Supply Company, Taft.]

[In pencil:] 1260.

Los Angeles, California,
August 6th, 1910.

Oil Well Supply Co.,
Taft, California.

Gentlemen:— Cleveland Oil Company.

Confirming our telephone conversation of yesterday, you have the privilege of delivering the Cleveland Oil Company 1100' of 8 $\frac{1}{4}$ " 28# Casing. This is granted for the reason they are to pay us its equivalent in cash, today.

Yours very truly,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO. of
Pittsburgh, Penn.

JOHN M. SANDS,
Treasurer.

JMS/R. [139]

**[Letter Dated August 10, 1910, from R. H. Herron
Company to Cleveland Oil Company.]**

Los Angeles, Cal., Aug. 10, 1910.

Cleveland Oil Co.,

426 H. W. Hellman Bldg., City.

Gentlemen:—

We are handing you herewith canceled note dated
June 23, 1910, for \$3,000.00; also receipt for \$1526.83.

Yours truly,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO. of
Pittsburgh, Penn.

JOW-McD.

Encs. [140]

**[Letter Dated August 13, 1910, from R. H. Herron
Company to John M. Sands.]**

[In pencil:] 1260.

Los Angeles, Cal., Aug. 13, 1910.

Mr. John M. Sands, CLEVELAND OIL CO.,
San Francisco, Cal. WHL-8/13/10.

Dear Sir:—

A day or two after you left here the Moron store called us by 'phone and wanted to know if they should deliver to the Cleveland Oil Co. a full car of 81¼" 36# casing in place of the 1100' 81¼" 36# which you authorized. I told them if it was necessary they could deliver up to 1200' as they required that amount on their well, but not to deliver a full car load.

Bakersfield called up and said they wanted 500' 10" 40# casing. In instructed them not to deliver it. I called Judge Campbell on the 'phone and advised him that his superintendent wished the pipe and he stated he would investigate and advise us. So far we have heard nothing from him. The Judge did not seem to be at all hurt over the transaction but rather seemed to appreciate the fact that it gave them an opportunity to keep track of their purchases and make arrangements from the main office.

The Cleveland Oil Co., as you will doubtless remember paid the balance of the \$3000.00 note last Monday, but have paid us nothing on the open account.

Very truly yours,

R. H. HERRON CO.

Affiliated with the OIL WELL SUPPLY CO. of
Pittsburgh, Penn.

WALTER H. LYON,

Secretary.

WHL/McD. [141]

[Letter Dated August 22, 1910, from Walter H. Lyon
to J. M. Sands.]

[In pencil:] 1260

John Eaton,
President of both Companies.

John M. Sands,
Vice-president & Treasurer.
R. H. Herron Co.

Walter H. Lyon,
Secretary R. H. Herron Co.

Main Office:
Los Angeles, Cal.

Branches:
San Francisco, Cal.
Coalinga, "
Bakersfield, "
Oreutt, "
Santa Maria, "
Maricopa, "
Moron, "
McKittrick, "

Machine and Forge Works:
Los Angeles and Coalinga.

R. H. HERRON CO.

Affiliated with

OIL WELL SUPPLY CO.

of

Pittsburgh, Pa.

Address all Communications to "Oil Well Supply
Co."

Los Angeles, Cal., Aug. 22, 1910.

Mr. John M. Sands,

San Francisco, Calif.

Dear Sir:—

CLEVELAND OIL CO.
"In Reply Please Refer to"
WHL-8/22-10

Had a talk with Mr. Batchelder of the Cleveland Oil Co. this morning. It seems that their refinery in the Kern River Fields burned down Saturday, and that they are having trouble in raising the \$1700.00 necessary for the 1000' 8" casing for the Kern River Field.

It seems that the National sent them a car of 81¼" to the Midway field, and by mistake their Supt. un-

loaded it and hauled it out. You know we gave them 1000' there and the result is, that they have 2000' *feet* too much in the Midway field and have none in the Kern River.

They have not taken care of their note due today.

We are simply giving you this information that you may be in touch with the matter.

Very truly yours,

_____,
_____,

WALTER H. LYON,
Secretary.

WHL—McD.

[In pencil:]

Keep after them at least twice a day.

Make them come through.—J. M. S. [142]

**[Letter Dated October 26, 1910, from R. H. Herron
Company to J. L. Scott.]**

Los Angeles, California, October 26th, 1910.

Mr. J. L. Scott, District Manager,

R. H. Herron Co., Affiliated with Oil Well Supply Co. Pittsburgh, Pa., Taft, Calif.

Dear Sir:—

We haven't received any record of the Casing that we arranged to have returned by the Cleveland Oil Company, to the Taft store. Please advise promptly.

Yours very truly,

R. H. HERRON CO.,

Affiliated with the OIL WELL SUPPLY CO. of
Pittsburgh, Penn.

JOHN M. SANDS,

Treasurer.

JMS/R. [143]

[Letter Dated November 5, 1910, from W. A. France
to J. M. Sands.]

[In pencil:] 1260

THE FRANCE MEDICAL INSTITUTE CO.

Chronic Diseases a Specialty.

Nos. 38 & 40 West Gay Street.

Established

1886

Telephone

2862

Columbus, O. Nov. 5, 1910.

Mr. J. M. Sands,

c/o R. H. Herron Co.,
Los Angeles, Cal.

[In pencil:]
Cleveland Oil Co.

My dear Mr. Sands:—

A letter from your company received November 5th. In reply, would say I presume that it would be more satisfactory to have a talk with my brother in regard to the affairs of myself and The Cleveland Oil Co. It was for that reason that I did not communicate direct with you. I am making arrangements to get back to Los Angeles as soon as possible. I feel quite sure if I were there that we could make everything satisfactory.

If it is not too much trouble, would like to have a copy of the letter referred to, in regard to my guaranteeing payment of certain debts of the Cleveland Oil Co. We do not want any extra expense made, and expect to do everything possible to satisfy you in regard to the claims which you have, either against me or the Cleveland Oil Co. The burning of our

refinery and the bad luck in getting down our well in the Midway field has set us back a little, but we are now making arrangements so that in a short time we expect to be able to satisfy all of our creditors. Would be glad to have you communicate with my brother, as he can explain the matter better than I can write it. Will be glad to hear from you at any time.

Yours truly,

W. A. FRANCE.

(Endorsed:) U. S. District Court No. 686. Claimant—Exhibit No. 4. Filed July 25, 1912. Helm, Referee. [144]

[Letter Dated November 15, 1910, from Cleveland Oil Company to Mr. Ware.]

[In pencil:] 1260.

Los Angeles, California, November 15th, 1910.

Mr. Ware, Supt.,

Cleveland Oil Co., Midway, California.

Dear Sir:—

This will instruct you to deliver to Mr. J. L. Scott, representative of the R. H. Herron Company, or bearer, the two Pumps that are on our property.

Yours very truly,

CLEVELAND OIL COMPANY.

[In pencil:] Signed (Edson France) Treas.

[145]

**[Letter Dated November 25, 1910, from J. L. Scott
to John M. Sands.]**

John Eaton,
President of both Companies.

John M. Sands,
Vice-president & Treasurer.
R. H. Herron Co.

Main Office:
Los Angeles, Cal.

Branches:
San Francisco, Cal.
Coalinga, "
Bakersfield, "
Orcutt, "
Maricopa, "
McKittrick, "
King City, "
Midway "

Machine and Forge Works:
Los Angeles and Coalinga.

R. H. HERRON CO.

Affiliated with
OIL WELL SUPPLY CO.
of

Pittsburgh, Pa.

Taft, Calif., Nov. 25th, 1910.

John M. Sands General Manager,

R. H. Herron Company.

Los Angeles, Calif.

Dear Sir:—

The Cleveland Oil Co. returned the Pumps of which you wrote this morning. One of them is pretty badly stripped of parts, and we are told that the Consolidated Midway Co. or someone else will give us an order for the parts needed as soon as we can inspect the pumps and find out just what is wanted. This we will do at once, and will put them in shape to dispose of. Are we to give the Cleveland Oil Co. credit for the pumps, and place them in our stock, or will you attend to that.

Yours truly,

J. L. SCOTT. [146]

[Letter Dated December 20, 1910, from New York-Midway Oil Company to the Stockholders of the Cleveland Oil Company.]

[In pencil:] 1260.

G. E. Averill, President.
M. P. Waite, Vice-president.

C. C. Spicer, Treasurer.
M. Kinney, Secretary.

File with Cleveland Oil Co.

NEW YORK MIDWAY OIL COMPANY.

Phones Main 4931.

F-5495.

603 W. P. Story Building.

Los Angeles, Cal.

Los Angeles, Cal., Dec. 20, 1910.

To the Stockholders of the Cleveland Oil Co.

Gentlemen:

The New York-Midway Oil Company was recently incorporated with a capital of \$1,250,000 under the laws of the State of California by several of the larger stockholders of the Cleveland Oil Company. The object of this company is to acquire the property of the Cleveland Oil Company upon some basis fair to the bondholders, the creditors and the stockholders of the Cleveland Oil Company. All of the stock of this company is in its treasury. We have concluded arrangements with practically all of the bondholders by which this company will acquire all of the bonds of the Cleveland Oil Company, amounting to \$100,000, for about 300,000 shares of stock.

The Cleveland Company owes, in addition to its bond issue, about \$50,000 to general creditors. There are now pending, three suits against the Cleveland Company, involving the payment of various sums of

money and also involving the title to some of the company's leases. It is the intention of the New York-Midway Oil Company to settle with all these creditors, to adjust all matters now in litigation and to save to the individuals who are the stockholders of the Cleveland Oil Company the equity which they now have in their property.

In order to accomplish these purposes the New York-Midway Oil Company hereby offers for a period of thirty days to each stockholder of the Cleveland Oil Company the privilege of [147] exchanging his stock, for stock in the New York-Midway Oil Company upon a basis of ten shares of Cleveland for one share of New York-Midway, and of purchasing an additional amount of stock in the New York-Midway Oil Company equal to his original holding of Cleveland, upon the payment of ten cents per share; this payment to be made in four equal monthly installments. After this plan has worked out the New York-Midway Oil Company will own all the bonds of the Cleveland property, it will have settled all of the debts of the Cleveland Company, and will own all of the stock of the Cleveland Company.

Very truly yours,

NEW YORK-MIDWAY OIL COMPANY.

By M. KINNEY, Secretary. [148]

[Order of Court Confirming Report of Referee.]

At a stated term, to wit, the January Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the Court-room thereof, in the city of Los Angeles, on Monday, the 20th day of January, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 686—BKCY. S. D.

In re CLEVELAND OIL COMPANY, Bankrupt.

This matter coming on at this time to be heard on a review of the order of the Referee in bankruptcy herein disallowing the claim of R. H. Herron & Company for \$14,804.32, unless said claimant should surrender and pay to the trustee in bankruptcy herein the sum of \$5,123.37, paid to it as a preference, together with interest as specified in said order; Geo. E. Whitaker, Esq., appearing as counsel for R. H. Herron & Company, Lorin E. Crenshaw, Esq., appearing as counsel for the trustee in bankruptcy; and said matter having been argued, on behalf of R. H. Herron & Company by Geo. E. Whitaker, Esq., of counsel for said creditor, and on behalf of the trustee by Lorin E. Crenshaw, Esq., of counsel for said trustee, and on behalf of R. H. Herron & Company by Geo. E. Whitaker, Esq., of counsel for said creditor, and the report of the Referee herein having thereupon been submitted to the Court for its

consideration and decision; it is now by the Court ordered that the report of the Referee in bankruptcy concerning this matter be, and the same hereby is confirmed, to which ruling of the Court, on motion of Geo. E. Whitaker, Esq., of counsel for R. H. Herron & Company, exceptions are, by direction of the Court, hereby noted herein on behalf of said R. H. Herron & Company. [149]

[Petition for Appeal and Order Allowing Appeal.]

In the District Court of the United States, for the Southern District of California, Southern Division.

No. 686—IN BANKRUPTCY.

In the Matter of the CLEVELAND OIL COMPANY, Bankrupt.

PETITION ON APPEAL OF THE R. H. HERRON COMPANY, A CORPORATION, A CREDITOR OF THE CLEVELAND OIL COMPANY, A CORPORATION, BANKRUPT.

The above-named R. H. Herron Company, a creditor of the Cleveland Oil Company, a corporation, bankrupt, considering it is aggrieved by the judgment and order made and entered on the 20th day of January, 1913, in the above-entitled cause, does hereby appeal from such judgment and order to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and the said R. H. Herron Company prays that this appeal may be allowed, and that a transcript of the records,

proceedings and papers upon which said judgment and order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

GEO. E. WHITAKER,

Attorney for the R. H. Herron Company, a Corporation, Creditor of the Cleveland Oil Company, a Corporation, Bankrupt.

The foregoing claim of appeal is allowed.

Dated January 30th, 1913.

OLIN WELLBORN,

District Judge.

[Endorsed:] No. 686. In the District Court of the United States for the Southern District of California, Southern Division. [150] In the Matter of the Cleveland Oil Company, Bankrupt. Petition for Appeal and Order Allowing Appeal. Filed Jan. 30, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Jan. 30, 1913. Rec'd Copy, Hickcox & Crenshaw, Attys. for Trustee. Geo. E. Whitaker, Stoner Block, Bakersfield, Cal., Attorney for R. H. Herron Co. [151]

[Assignment of Errors on Appeal.]

In the District Court of the United States, for the Southern District of California, Southern Division.

No. 686—IN BANKRUPTCY.

In the Matter of the CLEVELAND OIL COMPANY,

Bankrupt.

And now on this the 30th day of January, 1913, came the R. H. Herron Company, a creditor of the Cleveland Oil Company, a corporation, bankrupt, by Geo. E. Whitaker, Esq., its attorney, and says that the judgment and order rendered and made in said cause confirming the findings and decree of Lynn Helm, Esq., Referee in bankruptcy for the county of Los Angeles, and adjudging that the said R. H. Herron Company had received preferences from said bankrupt while a creditor thereof, and had reasonable cause to believe that the said Cleveland Oil Company, a corporation, was insolvent at the time of the payments and transfers made by said Cleveland Oil Company to said R. H. Herron Company and objected to by said trustee, is erroneous and against the just right of the said R. H. Herron Company, and it assigns the judgment and order of said District Court so rendered and made as erroneous and against its just right in that it was adjudged that:

FIRST.—That the evidence adduced before said Referee at the hearing of the objections made to the allowance of the claim presented and filed by the said R. H. Herron Company, against the estate of said Cleveland Oil Company, a corporation, bankrupt, showed that a preference was received by the said R. H. Herron Company.

SECOND.—That said Court erred in finding that the said R. H. Herron Company had reasonable cause to believe that it was intended thereby to give a preference to it by the payment [152] of the moneys and the transfers of material in the amounts and at the times set forth and objected to by said

trustee; and in affirming the findings and decree of said Referee in that respect.

THIRD.—That said Court erred in finding from the evidence that the said R. H. Herron Company received any preference by reason of any payments of money or transfers of material, and in affirming the findings and decree of the Referee in that respect.

FOURTH.—That said Court erred in finding that any payments or transfers made to the said R. H. Herron Company by said bankrupt were preferences for any amount, and in affirming the findings and decree of said referee in that respect.

FIFTH.—That said Court erred in ordering said R. H. Herron Company to pay the sum of \$5,123.37, or any sum at all, to the trustee before its said claim for \$14,804.32 as filed be allowed, and in affirming the findings and decree of said Referee in that respect.

SIXTH.—That said Court erred in its conclusions of law and in affirming the conclusions of law found by the Referee from the evidence given at the hearing had before him in said matter.

WHEREFORE, the said R. H. Herron Company prays that the said judgment and order may be reversed and that it be ordered, adjudged and decreed by this Honorable Court that the said R. H. Herron Company received no preferences whatever from said bankrupt, and that the claim filed by it against the estate of said bankrupt be ordered allowed in full.

GEO. E. WHITAKER,

Attorney for said R. H. Herron Company.

[Endorsed:] No. 686. In the District Court of the United States [153] for the Southern District

of California, Southern Division. In the Matter of the Cleveland Oil Company, Bankrupt. Assignment of Errors on Appeal. Filed Jan. 30, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Jan. 30, 1913. Rec'd copy, Hickcox & Crenshaw, Attys. for Trustee. Geo. E. Whitaker, Stoner Block, Bakersfield, Cal., Attorney for R. H. Herron Co. [154]

[Bond on Appeal.]

In the District Court of the United States, for the Southern District of California, Southern Division.

No. 686—IN BANKRUPTCY.

In the Matter of the CLEVELAND OIL COMPANY,

Bankrupt.

KNOW ALL MEN BY THESE PRESENTS: That we, R. H. Herron Company, a corporation, as principal, and R. J. White and Martin Gundlach, as sureties, are held and firmly bound unto Wm. H. Moore, Jr., trustee in bankruptcy of the Cleveland Oil Company, a corporation, bankrupt, in the full and just sum of Five Hundred Dollars (\$500.00), to be paid to the said Wm. H. Moore, Jr., trustee as aforesaid, his certain attorneys or successors in interest; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of

January, in the year of our Lord one thousand nine hundred and thirteen.

WHEREAS, lately at the District Court of the United States, for the Southern District of California, Southern Division, in the hearing of the petition by the R. H. Herron Company, a corporation, for a review of the findings and decree of Lynn Helm, Esq., referee in bankruptcy for the county of Los Angeles, in the matter of a claim filed by the said R. H. Herron Company, a corporation, against the estate of the Cleveland Oil Company, a corporation, bankrupt, wherein the said referee in bankruptcy had disallowed said claim upon the ground of the said R. H. Herron Company having received a [155] preference while a creditor of said Cleveland Oil Company, bankrupt, a judgment and order was rendered and made by said court in favor of Wm. H. Moore, Jr., trustee of said bankrupt, and against the said R. H. Herron Company, and affirming the findings and decree of said referee in bankruptcy in said matter, and the said R. H. Herron Company having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the judgment and order in the aforesaid matter, and a citation directed to the said Wm. H. Moore, Jr., trustee of said Cleveland Oil Company, a corporation, bankrupt, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden at the city of San Francisco in said Circuit, on the 28th day of February next.

Now, the condition of the above obligation is such

that if the said R. H. Herron Company shall prosecute its appeal to effect, and answer all damages and costs if it fails to make its appeal good, then the above obligation to be void; else to remain in full force and effect.

R. H. HERRON COMPANY (Principal).

By GEO. E. WHITAKER,

Its Attorney in Fact.

R. J. WHITE (Surety).

MARTIN GUNDLACH (Surety). [156]

State of California,
County of Kern,—ss.

R. J. White and Martin Gundlach, the sureties whose names are subscribed to the above undertaking, being duly sworn, depose and say: That they are each residents and householders within the State of California, and are each worth the sum specified in the said undertaking as the penalty thereof, over and above all their just debts and liabilities, exclusive of property exempt from execution.

R. J. WHITE.

MARTIN GUNDLACH.

Subscribed and sworn to before me this 29 day of January, 1913.

[Seal]

J. A. HERPEL,

Notary Public in and for the County of Kern, State of California.

Approved by:

OLIN WELLBORN,

United States District Judge, this 30th day of January, 1913.

[Endorsed]: No. 686. In the District Court of the United States for the Southern District of California, Southern Division. In the Matter of the Cleveland Oil Company, Bankrupt. Bond on Appeal. Filed Jan. 30, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Jan. 30, 1913. Rec'd copy, Hickcox & Crenshaw, Attys. for Trustee. Geo. E. Whitaker, Stoner Block, Bakersfield, Cal., Attorney for R. H. Herron Co. [157]

[Praecept for Transcript.]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California.

Clerk's Office.

No. 686—BKCY.

In the Matter of the CLEVELAND OIL COMPANY, a Corporation,

Bankrupt.

To the Clerk of Said Court:

Sir: Please issue certified transcript of record in said matter to consist of transcript of testimony taken on hearing of claim of R. H. Herron Company before referee on the 24th of July, 1912; letters introduced in evidence on said hearing, decree of the referee, order of the United States District Court confirming the decree, statement of account (not the bills) which the R. H. Herron Company filed in support of its claim against the bankrupt, petition for

appeal, bond on appeal, assignment of errors, to be certified under the hand of the clerk and the seal of the Court.

GEO. E. WHITAKER,

Attorney for R. H. Herron Co., Appellant.

[Endorsed]: No. 686—Bank. U. S. District Court, Southern District of California, Southern Division. In the Matter of the Cleveland Oil Co., Bankrupt. Praeceptum for Certified Transcript of Record. Filed Feb. 13, 1913, at 15 min. past 11 o'clock A. M. Wm. M. Van Dyke, Clerk. Virgil W. Owen, Deputy. [158]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 686.

In the Matter of the CLEVELAND OIL COMPANY, a Corporation,

Bankrupt.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and fifty-eight typewritten pages, numbered from 1 to 158, inclusive, and comprised in one volume, to be a full, true and correct copy of the Referee's Report on Petition for Review, the Testimony on the hearing of the claim

of R. H. Herron Company before the Referee, the Statement of Account filed by the R. H. Herron Company in support of its claim against the bankrupt, the letters introduced in evidence on said hearing, the Order of the Court Confirming the Report of the Referee, the Petition for Appeal, the Order Allowing the Appeal, the Assignment of Errors on Appeal, and the Bond on Appeal in the above and therein entitled matter, and that the same together constitute the record in said matter upon the appeal of R. H. Herron Company, a corporation, from the Judgment and Order of the Court Confirming the Report of the Referee in said matter as specified in the Praecipe filed [159] in my office on behalf of said R. H. Herron Company, a corporation, by its attorney of record.

I do further certify that the cost of the foregoing record is \$77.60, the amount whereof has been paid me on behalf of said R. H. Herron Company, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 19th day of February, in the year of our Lord one thousand nine hundred and thirteen and of our Independence the one hundred and thirty-seventh.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [160]

[Endorsed]: No. 2254. United States Circuit Court of Appeals for the Ninth Circuit. R. H. Herron Company, a Corporation, Appellant, vs. William H. Moore, Jr., Trustee in Bankruptcy of the Cleveland Oil Company, a Corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Received March 12, 1913.

F. D. MONCKTON,
Clerk.

Filed March 13, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals, in
and for the Ninth Circuit.*

IN BANKRUPTCY—No. 686.

In the Matter of the CLEVELAND OIL COM-
PANY, a Corporation,

Bankrupt.

Stipulation Extending Time to File Transcript.

IT IS HEREBY STIPULATED by and between Messrs. Hickcox & Crenshaw, attorneys for William H. Moore, Jr., trustee in bankruptcy of the Cleveland Oil Company, a corporation, bankrupt, and George E. Whitaker, attorney for R. H. Herron & Company, a corporation, that the claimant, R. H.

Herron & Company, may have up to and including the 15th day of March, 1913, in which to file the Transcript on Appeal in the above-entitled proceeding.

Dated February 25, 1913.

ROSS T. HICKCOX,

L. O. CRENSHAW,

Attorneys for William H. Moore, Jr., Trustee in
Bankruptcy of the Cleveland Oil Co., Bankrupt.

GEO. E. WHITAKER,

Attorney for R. H. Herron & Company.

Dated San Francisco, California, February 27,
1913.

So ordered:

WM. B. GILBERT,

Senior United States Circuit Judge for the Ninth
Circuit.

[Endorsed]: 2254. In the United States Circuit Court of Appeals, in and for the Ninth Circuit. In Bankruptcy—No. 686. In the Matter of the Cleveland Oil Company, a Corporation, Bankrupt. Stipulation Extending Time to File Transcript. Filed Feb. 27, 1913. F. D. Monckton, Clerk. Refiled Mar. 13, 1913. F. D. Monckton, Clerk.

6
No. 2335

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs in Error,
vs.

THOMAS S. POINDEXTER,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Idaho,
Central Division.

FILED

DEC 4 - 1913

United States
Circuit Court of Appeals

For the Ninth Circuit.

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs in Error,
vs.

THOMAS S. POINDEXTER,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Idaho,
Central Division.

INDEX TO THE PRINTED TRANSCRIPT OF
RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

FORNEY & MOORE, Moscow, Idaho,

WILSON & NEAL, Portland, Oregon,

Attorneys for Plaintiffs in Error.

C. J. ORLAND, Moscow, Idaho,

J. T. BROWN, Colfax, Washington,

Attorneys for Defendant in Error.

*In the Circuit Court of the United States, District of
Idaho, Northern Division.*

J. M. LEITER and FLOYD J. CAMPBELL,

Plaintiffs,

vs.

THOS. S. POINDEXTER,

Defendant.

Complaint.

Now come the plaintiffs and for cause of action against the defendant allege:

I.

That during all the times and dates herein mentioned A. C. Ruby was and now is doing business under the firm name and style of The A. C. Ruby Co., with his principal office and place of business in the City of Portland, Oregon. That said A. C. Ruby is now, and has been during all the times and dates herein mentioned, a resident and a citizen of the State of Oregon.

II.

That the plaintiffs, J. M. Leiter and Floyd J. Campbell, are citizens and residents of the State of

Oregon and have been during all the times and dates herein mentioned and are entitled to maintain this action.

III.

That the defendant above named is a resident and citizen of the State of Idaho.

IV.

That on the 14th day of February, 1911, the defendant, Thos. S. Poindexter, and one Henry Stroh, for a valuable [1*] consideration, made, executed and delivered to The A. C. Ruby Co. their certain promissory note, bearing date on that day, in words and figures substantially as follows, to wit:

“STOCKHOLDER’S PURCHASING CONTRACT.

Feb. 14, 1911.

After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53,347, owned by The A. C. Ruby Co., of Portland, Ore., and recognizing his value as a means of improving our horse stock, we the undersigned subscribers, hereby purchase said Stallion of The A. C. Ruby Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

\$2800.00 Portland, Oregon, Feb. 14th, 1911.

For value received, I promise to pay to the order of The A. C. Ruby Co., the sum of Twenty-eight Hundred Dollars, payable at the Merchants’ National Bank, Portland, Oregon, in payments as follows:

One Thousand and 00/100 Dollars.....

.....Oct. 1st, 1911

*Page-number appearing at foot of page of original certified Record.

Nine hundred and 00/100 Dollars.....

.....Oct. 1st, 1912

Nine hundred and 00/100 Dollars.....

.....Oct. 1st, 1913

with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid, the whole sum of both principal and interest to become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay reasonable attorneys fees.

THOS. S. POINDEXTER.

HENRY STROH."

Which said note contains the following indorsements on the back:

"The A. C. RUBY CO.,

A. C. R.

A. C. RUBY,

Received payment as follows:

2/17-1911. Paid by Thos. S. Poindexter...\$400.00 one-third to be applied on each of the three payments."

V.

That the interest due on said note on August 14, 1911, has not been paid, nor any part thereof, although the same has been duly demanded, and that the defendant, Thos. S. Poindexter, and the said Henry Stroh, have refused payment thereof. That the said note provides that if the interest is not paid when due, the entire note shall become due and payable at the option of the holder thereof. That the plaintiffs have exercised their rights under said option, provided for in the terms of the said [2] note, demanded payment from the defendant, Thos.

S. Poindexter, and from said Henry Stroh, of the whole sum, both principal and interest.

VI.

That said Henry Stroh is a resident and citizen of the State of Washington.

VII.

That said note has not been paid nor any part thereof, except the sum of \$400.00 paid by the defendant, Thos. S. Poindexter, to apply, one-third on each installment of principal provided for in said note.

VIII.

That prior to the 14th day of August, 1911, The A. C. Ruby Co., aforementioned, for a valuable consideration, sold, assigned and transferred by endorsement, the said note to J. M. Leiter and Floyd J. Campbell, plaintiffs herein, and that the said plaintiffs are now the legal owners and holders of the said note.

IX.

That it is provided, in said note, that in case suit or action is instituted to collect same or any portion thereof, that the makers thereof agree to pay a reasonable sum as attorneys' fees in said suit or action. That the sum of \$350.00 is a reasonable sum to be allowed plaintiffs as attorneys' fees herein. That the amount involved in this controversy exclusive of interest and costs is more than \$2000.00.

WHEREFORE, the plaintiffs demand judgment against the defendants for the sum of \$2400.00, with interest thereon from February 14, 1911, at eight per cent per annum until paid, and for the sum of

\$350.00 attorneys' fees herein and for the costs and disbursements in this action.

FORNEY & MOORE and
WILSON & NEAL,
Attorneys for Plaintiffs. [3]

State of Oregon,
County of Multnomah,—ss.

I, Floyd J. Campbell, being first duly sworn, say:
That I am one of the plaintiffs in the above-entitled
action and that the foregoing complaint is true as I
verily believe.

FLOYD J. CAMPBELL.

Subscribed and sworn to before me this 14th day
of December, 1911.

[Notary Seal]

O. A. NEAL,
Notary Public for Oregon.

[Endorsed]: Filed December 16, 1911. A. L.
Richardson, Clerk. By M. W. Griffith, Deputy. [4]

*In the District Court of the United States, District of
Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOS. S. POINDEXTER,
Defendant.

Demurrer.

Comes now the said defendant in the above-en-
titled action and demurs to the plaintiffs' complaint
and for cause of demurrer alleges:

That the complaint of the said plaintiffs does not state facts sufficient to constitute a cause of action against said defendant.

C. J. ORLAND,

Attorney for said Defendant, Residing at Moscow, Idaho.

[Endorsed]: Filed Jan. 12, 1912. A. L. Richardson, Clerk. By M. W. Griffith, Deputy. [5]

Order Allowing Defendant to Withdraw Demurrer.

At a stated term of the District Court of the United States for the District of Idaho, held at Moscow, Idaho, on Monday, the 13 day of May, 1912. Present: Hon. FRANK S. DIETRICH, Judge.

No. 525.

J. M. LEITER et al.

vs.

THOS. S. POINDEXTER.

Now came the parties by the respective attorneys and thereupon, by leave of Court, the defendant withdrew the demurrer heretofore filed to the complaint herein and is given fifteen days from this date to file and serve his Answer in said cause. [6]

*In the District Court of the United States, District of
Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOS. S. POINDEXTER,
Defendant.

Answer.

Comes now the said defendant and answering the complaint of the plaintiffs, denies and alleges, as follows:

I. Answering paragraph numbered IV of plaintiffs' complaint,—

Deny that on the 14th day of February, 1911, or at any other time or date, that the said defendant, with one Henry Stroh or with any other person or otherwise, for a valuable consideration or any consideration, or by himself, or at all made or executed, or delivered to the A. C. Ruby Co. or to any person or persons for the said A. C. Ruby Co., his or their or either of their certain promissory note, or any promissory note, or any note whatever, to the said A. C. Ruby Co. Deny that the said defendant made or executed or delivered to the said A. C. Ruby Co. his promissory note or any *promissory* on the 14th day of February, 1911, or at other time or date or otherwise or at all.

Deny that said defendant made or executed or delivered to A. C. Ruby Co. or any other person or persons, any promissory note, or note or instrument in words or figures, as set forth in plaintiffs' com-

plaint, or in substantially such words or figures, or in any such words or figures, and deny that the said defendant ever at any time made or executed, or signed or delivered to A. C. Ruby Co. or to any person or persons for A. C. Ruby Co. a note or any note, of which a purported copy thereof is set out in plaintiffs' complaint, [7] or any other promissory note or any note whatever.

Deny that said purported note or any note, made or executed or delivered to A. C. Ruby Co. has indorsed thereon, as paid by Thos. S. Poindexter \$400.00, or any other sum; Deny that said defendant paid \$400.00, or any other sum of money whatever on said note or any note, to A. C. Ruby Co.

II. Answering paragraph numbered V, of plaintiffs' complaint,—

Deny that the interest or any interest is due on said note or any note, or on the 14th day of August, 1911, or at any other time.

Admit that the said defendant has refused to pay any interest on said purported note.

Deny that said defendant has at any time, made or executed or delivered said note or any note to the said A. C. Ruby Co. or that said note or any note provides that if the interest is not paid when due, the entire note or any note shall become due or payable at the option of the holder or any holder thereof.

Admit that plaintiffs, or one of them, has demanded payment of said note of and from said defendant, which he refused, for the reason that he never, at any time made, or executed or delivered said note or any note to A. C. Ruby Co. or any other

person or persons, to or for A. C. Ruby Co. or any other person, firm or corporation.

III. Answering paragraph numbered VII of plaintiffs' complaint,—

Deny that said defendant has paid on said note or any note to A. C. Ruby Co. the sum of four hundred dollars, or any other sum of money, or any other number of dollars, whatever, or that said sum of money or any sum of money was to apply, one-third or any other amount on each or any installment or principal, provided for in said note or any note, or otherwise.

IV. Answering paragraph numbered VIII, of the plaintiffs' complaint, the said defendant alleges, that he has no information or belief, upon the matters therein alleged, sufficient to enable him to answer the allegations therein set forth, and placing his denials [8] upon that ground, deny that prior to the 14th day of August, 1911, or at any other time, the said A. C. Ruby, for a valuable consideration or any consideration, sold, or assigned or transferred, by endorsement or otherwise, the said note or any note to J. M. Leiter or Floyd J. Campbell, or either of them, the plaintiffs herein, and deny that the said plaintiffs or either of them are now, or were at the time of the commencement of this action, or ever have been the legal owners or holders of the said note, or any note made or executed by the said defendant, or to which his name is signed.

V. Answering paragraph numbered IX of plaintiffs' complaint,—

Deny that the sum of three hundred and fifty dol-

lars is a reasonable attorney's fee to be allowed, in this action by the Court or that any other sum of money or amount is a reasonable attorneys' fee in this action.

VI. Deny that said defendant is indebted to the said plaintiffs upon said pretended promissory note, or any promissory note, in any sum whatsoever or at all.

For a further and separate defense, the said defendant alleges:

I. That on or about the 8th day of February, 1911, the said defendant was consulted and interviewed by one Watson, an agent of the said A. C. Ruby Co. mentioned in plaintiffs' complaint, as the person or firm to whom said purported note was executed as payee, to sell the said defendant an interest in a stallion which he then had or claimed to have in his possession, which said defendant declined, the said agent of the said A. C. Ruby Co. informed the said defendant that they would sell said stallion in shares of four hundred dollars each, for the sum of two thousand eight hundred dollars and offered, and promised the said defendant, that if he would assist in the sale of the said stallion, which as defendant is informed and believes is named Ithos and numbered 53,347, that he the said agent would give him as compensation for such services, in the event of making a sale of said stallion, one share in said stallion, which [9] he valued at four hundred dollars.

II. That at the time of said offer and interview, the said agent of A. C. Ruby Co., and at various other and divers times, during the transaction herein de-

tailed, represented to the said defendant that said stallion was sound and all right in every respect, that he was a good horse, with no defects, and would make and was a good breeder, and would make a good horse, with which to improve the stock in the vicinity, and that he was a valuable horse, and represented said stallion as being desirable for the purpose of breeding, and the said defendant relying upon said representations of the said agent of said A. C. Ruby Co., as to the quality of said stallion, and that he was in all respects as represented by said agent, and that said stallion was fit for the purposes of breeding, and was sound and desirable for breeding purposes, and was a valuable horse, entered into negotiations with the said agent of A. C. Ruby Co. with a view and purpose of assisting in such sale, and relying upon the representations of said agent of A. C. Ruby Co. as to the quality of said horse, and believing that said representations were true and correct, and that the horse was in all respects as represented, by said agent.

III. That the said defendant did nothing in said premises, further than said negotiations, that he did not attempt to sell said horse or any interest therein, and did not attempt to procure a purchaser for said stallion or any interest thereon, or do anything, in connection therewith, other than such negotiations as herein set forth and that a short time after such negotiations, the said agent aforesaid of A. C. Ruby Co. notified and informed the said defendant that he had sold said stallion to one Henry Stroh, except one share which had been reserved from said sale, and

that he the said defendant should have said share in said stallion, according to the offer that he the said agent had made to the said defendant, to assist him in selling said stallion. [10]

IV. That thereafter, the said Watson, agent of A. C. Ruby Co., as aforesaid, presented to the said defendant, a paper and requested him to sign the same, which he informed the said defendant was required, by A. C. Ruby Co. to be obtained from purchasers, showing who became the purchaser of the horse, and authorizing the delivery of the horse to some owner of an interest purchasing said horse, that it was necessary for him to obtain such authority prior to the delivery of said horse, as the same was required by the said A. C. Ruby Co. and that said instrument was in words and figures as follows, to wit:

**“STOCKHOLDER’S PURCHASING CON-
TRACT.**

Feb. 14, 1911.

After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53,347, owned by The A. C. Ruby Co. of Portland, Ore., and recognizing his value as a means of improving our horse stock, we the undersigned subscribers, hereby we hereby authorize the delivery of said horse to any one of the subscribers hereto.

Portland, Oregon.

For value received, I promise to pay to the order of — payable at the Merchants’ National Bank, Portland, Oregon, in payments as follows: — with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid, the whole sum

of both principal and interest to become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay a reasonable attorneys' fees.

That there was no indorsement upon said instrument, at the time it was shown to the said defendant, and no other paper, document or instrument than as above set forth, as nearly as defendant is able to give it, was ever presented to him in connection with said transaction; that he did not buy any interest in said stallion, and did not in any manner become indebted to A. C. Ruby Co., on account of said stallion, or in any other matter whatever.

V. That if the said instrument set out in plaintiffs' complaint in paragraph IV thereof, be in accordance with the original, of which it is claimed and alleged to be a copy, and the defendant's signature [11] be attached thereto, then the said defendant alleges, that said instrument has been altered and changed, as he at no time ever made, executed, signed or delivered any such instrument to A. C. Ruby Co. or to any other person or persons, that he never signed any instrument whereby he agreed to pay to A. C. Ruby Co. twenty-eight hundred dollars, and that he signed no instrument wherein he promised to pay one thousand dollars on the first day of October, 1911, and there was no promise to pay nine hundred dollars on the first day of October, 1912, and there was no promise to pay nine hundred dollars on the first day of October, 1913, and there was no promise to pay any sum of money at any time or date, and that as to all of said matters the said instrument has

been altered and changed, and that the said defendant never at any time made, executed or signed such instrument and never agreed to make, execute or sign such instrument, or any instrument for the payment of money in any amount to A. C. Ruby Co.

For a further and separate defense the said defendant alleges:

I. That the said stallion Ithos No. 53,347, as the said plaintiff has the said stallion numbered in his complaint, was represented by the A. C. Ruby Co. by and through his or their said agent Watson, to be sound, fit and desirable for breeding purpose, that he was suitable for breeding purposes for the purpose of improving horse stock, and that he was, in all respects fit, suitable and desirable for the purposes of breeding.

II. That said stallion Ithos No. 53,347 was not sound, in that he was wind-broken and could be moved but a few rods at a time, on account being so wind-broken, that he could not travel or be moved by his own physical strength, but a few rods at a time, and could not be moved from farm to farm, in the country, or from one city or village to another by his own physical strength, on account of such wind-broken condition, and that by reason and on account of said stallion being wind-broken, he was diseased, defective and unsound.

III. That said stallion was not fit or desirable to be used for breeding purposes, on account of his said unsound, diseased and defective [12] condition; that said stallion was worthless for the purpose of breeding or improving horse stock, and was not suit-

able to be used for that purpose on account of his diseased condition, and was useless and worthless for breeding or any other purpose whatever.

That said stallion was not such an animal as anyone would use for the purpose of improving horse stock, on account of his unsound and diseased condition.

IV. That the said A. C. Ruby Co., through their said agent, wilfully, falsely and fraudulently made the said representations to the said defendant, that the said stallion was sound, fit and suitable for breeding purposes, for the purpose of inducing said defendant to buy or take an interest in the said stallion, and to induce the said defendant to assist in the sale of said stallion, and that the A. C. Ruby Co. and the said agent knew that such representations and statements were false, and that they knew that said stallion was wind-broken, diseased and worthless for breeding purposes or any other purpose.

V. That whatever the said defendant did or assented to doing with reference to the sale of said stallion was done, by him, in full reliance upon the statements and representations, made to him by the said Watson, as the agent and as the representative of A. C. Ruby Co. in selling and disposing of said stallion.

That the said A. C. Ruby Co. and the said Watson knew that the said defendant relied upon the statements and representations so made to him, in all matters pertaining to said stallion, and that said defendant trusted and relied upon said statements and representations as to the condition and fitness of said

stallion for the purposes of breeding and improving stock, and as to all other matters pertaining to said stallion as herein alleged.

VI. That one Henry Stroh, whose name appears upon said instrument as set forth in plaintiffs' complaint, was, as said defendant is informed and believes, the purchaser of said stallion, and that as soon as it was discovered, or within a short time thereafter, that [13] the said stallion Ithos was diseased, he notified the said A. C. Ruby Co. thereof, and offered to return said stallion to him or them, and did ship said stallion to Portland, Oregon, where the said A. C. Ruby resides and where A. C. Ruby Co., is located, and tendered and offered to return to A. C. Ruby Co. the said stallion, which A. C. Ruby Co. refused, and refused to receive said stallion, although he had been shipped to Portland, and was there to deliver to said A. C. Ruby Co. without cost.

VII. That on or about February 14th, 1911, and after the said A. C. Ruby Co. had sold to Henry Stroh, the said stallion, the said agent of the said A. C. Ruby Co. notified the said defendant that he had sold said stallion to said Henry Stroh, but that in pursuance of a conversation had between said agent and the defendant, that he, the said agent, had reserved one share in said stallion, which he would give him, as he had before that time offered to do, if the defendant assisted in the sale of said stallion, and that he should have the said share in said stallion, although the said defendant had not assisted in said sale to Stroh, the same as though he had rendered such assistance, and requested the said defendant to

sign with Henry Stroh a certain guaranty or contract, with reference to the said stallion, and the said defendant, believing and relying upon the statements and representations, made by the said Watson, as to the condition, soundness and fitness of said stallion, for the purpose of breeding, and for the further reason that he was investing nothing in said stallion, or becoming in any manner responsible for said stallion, or paying any consideration therefor, signed said guaranty or contract, wholly relying upon the said statements and representations of said Watson as to the condition and fitness of said stallion for breeding purposes, his soundness and condition; which said statements and representations of said Watson as to the soundness, condition and fitness of said stallion as hereinbefore set forth were false and fraudulent and which the said A. C. Ruby Co. and Watson knew were false and fraudulent, at the time they were [14] made, and knew that the said defendant was relying upon said statements and representations, *and knew that the said defendant was relying upon said statements and representations* when he signed said guaranty.

For a further and third separate defense, defendant alleges:

I. That he is informed and believes, and upon such information and belief alleges, that the said plaintiffs J. M. Leiter and Floyd J. Campbell are copartners doing business in the city of Portland, Oregon, and that they and each of them are well acquainted with A. C. Ruby, doing business as A. C. Ruby Co., and that they know and are informed, as

to the methods, of the said A. C. Ruby, in the sale of stallions, and that they know and are informed that the said A. C. Ruby is dealing largely in defective stallions, and undesirable stallions, for breeding purposes, and that he is selling such stallions through the country for breeding purposes, and that they are each informed and know that these horses are represented to be fit and desirable for such breeding purposes, and that representations are made to purchasers of such horses, by the agents and representatives of A. C. Ruby, that said horses are sound, fit and desirable for breeding purposes, and that said horses when being offered and sold by said agents of A. C. Ruby Co. are misrepresented, and that the warranties and guaranties made and given by A. C. Ruby by and through his said agents representing A. C. Ruby Co. are untrue, and that said stallions are sold under false and fraudulent representations, and that notes are obtained in such transactions by fraud and trickery, and that the said plaintiffs know that many, if not all, of the notes obtained by the said A. C. Ruby Co. upon the sale of stallions are subject to defenses, on account of the misrepresentations made in the sale of stallions sold for which they are made, and the fraud and trickery, practiced in the obtaining of said notes, for sales or pretended sales of stallions, and that the said plaintiffs have knowledge of the likelihood of defenses against said notes, and had knowledge that there would likely be defenses against [15] the note upon which this action is brought.

II. That as defendant is informed and believes, the said plaintiffs are intimately associated with

A. C. Ruby, and that a portion of their business is the taking over under some arrangement and agreement by and between A. C. Ruby and these plaintiffs the promissory notes, obtained and received by A. C. Ruby as A. C. Ruby Co. upon the sales and pretended sales of stallions, for the purpose of placing them in the hands of pretended *bona fide* holders, before maturity, in order to defeat such defenses by the makers thereof, and that the said plaintiffs knew, or had reason to know, that the said promissory note upon which this action was brought was liable to defenses, by the said defendant, and that the note was not a valid subsisting liability of the said defendant, and that the same could not be collected by the said A. C. Ruby, Co., and that the said plaintiffs are not *bona fide* legal holders of said note, before maturity, for value, without notice of defects in said instrument, and without knowledge of such defects sufficient to require them to make inquiry as to the validity of said instrument.

WHEREFORE the said defendant demands judgment that the said plaintiffs take nothing by this action, and that the said defendant have and recover his costs and disbursements in this action sustained.

C. J. ORLAND,

Attorney for Defendant, Residence and Postoffice,
Moscow, Idaho. [16]

State of Washington,
County of Whitman,—ss.

Thos. S. Poindexter, being first duly sworn, says:
That he has read the foregoing answer and knows the

contents thereof, and that he is the defendant in said above-entitled action, and that he believes the facts stated in the above answer to be true.

THOS. S. POINDEXTER.

Subscribed and sworn to before me this 13th day of May, 1912.

[Notary Seal] W. W. RENFREW,
Notary Public, Residing at Farmington,
Wash.

Service accepted this 29th day of May, 1912.

FORNEY & MOORE.

[Endorsed]: Filed June 3, 1912. A. L. Richardson, Clerk. By M. W. Griffith, Deputy. [17]

*United States District Court, Central Division,
District of Idaho.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOMAS S. POINDEXTER,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the defendant.

CHARLES GILES,
Foreman.

[Endorsed]: Filed May 17, 1913. A. L. Richardson, Clerk. [18]

*In the District Court of the United States, District
of Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOS. S. POINDEXTER,
Defendant.

Judgment.

This action came on regularly for trial. The said parties appeared by their attorneys, Forney & Moore and Wilson & Neal, counsel for the plaintiffs, and C. J. Orland and J. T. Brown for the defendant. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiffs and defendant were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court, with the verdict signed by the foreman, and, being called, answered to their names, and say, "We, the jury in the above-entitled cause, find for the defendant."

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged and decreed that said plaintiffs take nothing by their action, and that the defendant have and recover his costs and disbursements in this action sustained, amounting to the sum of \$179.50.

Judgment entered May 17, 1913.

[Endorsed]: Filed May 17, 1913. A. L. Richardson, Clerk. [19]

*In the District Court of the United States, of the
District of Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOS. S. POINDEXTER,
Defendant.

**Order Extending Time to [July 17, 1913, to] File
and Serve Bill of Exceptions.**

On the application of the plaintiffs, through their attorneys, Forney & Moore and Wilson & Neal, it is ordered that the time in which to serve and file a Bill of Exceptions and statement of the case be extended sixty days from the 17th day of May, 1913, to the 17th day of July, 1913.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed May 22, 1913. A. L. Richardson, Clerk. [20]

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Monday, the 23d day of June, 1913.
Present: Hon. FRANK S. DIETRICH, Judge.

No. 525—Central Division.

J. M. LEITER et al.

vs.

THOS. S. POINDEXTER.

**Order Extending Time to [August 2, 1913, to] File
and Serve Bill of Exceptions.**

It is hereby ordered that the time to file and serve
Bill of Exceptions in this cause be extended from
July 17, 1913, to August 2, 1913. [21]

*In the District Court of the United States, Central
Division, District of Idaho.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOMAS S. POINDEXTER,
Defendant.

**Order [Extending Time to September 2, 1913, to
Prepare and Serve Bill of Exceptions].**

On the application of Forney & Moore, it is ordered
that the time for preparing and serving Bill of Ex-
ceptions in the above-entitled cause be, and is hereby
extended, from August 2d, to September 2d, 1913.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed July 21, 1913. A. L. Richard-
son, Clerk. [22]

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Monday, the 18th day of August, 1913.
Present: Hon. FRANK S. DIETRICH, Judge.
No. 525—Central Division.

[Order Extending Time to September 7, 1913, to File and Serve Bill of Exceptions.]

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOMAS S. POINDEXTER,
Defendant.

On motion of Messrs. Forney & Moore, attorneys for plaintiffs, ordered that the time to file and serve bill of exceptions herein be, and the same is hereby, extended for a period of twenty days from this date.

[23]

In the District Court of the United States Within and for the District of Idaho, Central Division.

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOMAS S. POINDEXTER,
Defendant.

Stipulation [That Respective Parties have No Amendments to Offer to Bill of Exceptions].

NOW COMES the respective parties hereto and by their counsel, stipulate and agree as follows:

THAT the respective parties hereto have no amendments to offer to the Bill of Exceptions presented and left with the Clerk for filing and settlement.

FORNEY & MOORE,
Attorneys for Plaintiffs.

C. J. ORLAND,
Attorney for Defendant.

[Endorsed]: Filed Oct. 1, 1913. A. L. Richardson,
Clerk. [24]

*In the District Court of the United States Within
and for the District of Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOMAS S. POINDEXTER,
Defendant.

Bill of Exceptions.

This cause coming on regularly for trial, at the May term of the United States court, held at Moscow, Idaho, before the Honorable F. S. DIETRICH and a jury. Upon the trial of said cause the following proceedings were had and the following testimony was introduced and none other:

[**Testimony of Samuel K. Watson, for Plaintiffs.**]

SAMUEL K. WATSON testified on behalf of plaintiffs as follows:

Q. What is your full name?

A. Samuel K. Watson.

(Testimony of Samuel K. Watson.)

Q. I show you an instrument in writing marked Exhibit "A" for identification by the notary public taking the depositions of A. C. Ruby, J. M. Leiter and Floyd J. Campbell and ask you if you recognize the signatures on that instrument. A. Yes, sir.

Q. Whose are they?

A. The one on top looks like Mr. Poindexter's and on the line below is Henry Stroh's.

Q. Did you see them sign that instrument?

A. Yes, sir.

Q. Do you know Mr. Poindexter when you see him?

A. Yes, sir. [25]

Q. Do you see him here in the room?

A. Yes, sir.

Q. Where is he?

A. He is the gentleman sitting back of Mr. Orland and Mr. Brown.

Mr. NEAL.—I will now read the deposition of A. C. Ruby to the jury.

[Deposition of A. C. Ruby, for Plaintiffs.]

A. C. RUBY, a witness for the plaintiffs, called and sworn, testified as follows:

Q. Where do you reside, Mr. Ruby?

A. Portland, Oregon.

Q. How long have you lived in Portland?

A. I have been here for very nearly ten years; I have made this my residence for five years.

Q. Under what name do you do business?

A. A. C. Ruby Company.

Q. Who composes the firm of A. C. Ruby Company? A. A. C. Ruby.

(Deposition of A. C. Ruby.)

Q. Are you the sole owner of the company?

A. Yes.

Q. That is simply the name you do business under?

A. Yes; that was the way we started it up, but for the last six years there has been no one with me.

Q. I show you a paper and ask you to state what it is.

A. This is a note taken for a horse sold to Thomas S. Poindexter and Harry Stroh of Farmington, Washington.

Q. What did you do with that note, if anything?

A. I kept the note until the latter part of June, 1911, and then I sold it to Mr. Leiter and Mr. Campbell.

Q. The plaintiffs in this case? A. Yes. [26]

Q. Examine the back of the note and state whose endorsement is contained thereon.

A. Mr. Thomas Poindexter is endorsed for \$400.00 as a payment on the back.

Q. \$400.00 paid on the note? A. Yes.

Q. Are there any other endorsements on the note?

A. No.

Q. Is your name thereon?

A. Yes, I endorsed it when I sold it to Mr. Leiter and Mr. Campbell.

Q. What, if anything, was paid you for that note by Mr. Campbell and Mr. Leiter?

A. I have not got the exact amount of dollars. I can figure it up. I know how much I got all right. I discounted this note with some five or six others at 12 per cent. I got \$2,400.00 and the accrued interest

(Deposition of A. C. Ruby.)

less twelve per cent.

Q. That is, you received the face of the note with the accrued interest, less twelve per cent?

A. Yes, sir.

Q. Prior to the time you transferred the note to Mr. Campbell and Mr. Leiter, were there any other payments endorsed thereon?

A. No, no other payments.

Q. Do you know the signature of Mr. Stroh and Mr. Poindexter, whether that is their signatures or not?

A. I think they are. They are the same as I have seen on letters they have written.

By Mr. NEAL.—I now offer in evidence this note which is marked Plaintiffs' Exhibit "A." [27]

Cross-examination by Mr. ORLAND.

Q. Did Mr. Poindexter or Mr. Stroh, or either of them, ever pay \$400.00 on that note?

Objected to by counsel for plaintiff as incompetent, irrelevant and immaterial.

Q. You may answer that question yes or not, and then explain, if you care to.

A. I don't think that it was paid in cash. It was, as I understood it, \$400.00 that Mr. Poindexter was to have in case he helped sell or find a buyer for the horse.

Q. Then, as a matter of fact, there has never been any cash paid upon that note?

Objected to by counsel for plaintiff as incompetent, irrelevant and immaterial.

Exception allowed.

(Deposition of A. C. Ruby.)

A. I never received any cash except what I got from Mr. Leiter and Mr. Campbell.

Q. From which of the defendants have you ever received any letters?

A. The man that sold the horse, he received a number; and I have seen them, I believe, from both of them. Most all the correspondence was done between them and Mr. Watson, and he showed me the letters and cards.

Q. Have you ever received any letters from either of the defendants yourself?

A. Yes, I have. I believe they were mostly through some attorney up there.

Q. Have you any of those letters in your possession?

A. No, I turned them in, I believe, to Mr. Leiter and Mr. Campbell, but I am not sure. I have not got them now.

Q. How long have you known Mr. Leiter and Mr. Campbell? A. About three years. [28]

Q. Are your relations with them friendly?

A. Just in a business way.

Q. How long have you known Mr. Campbell?

A. I do not think quite three years.

By Mr. NEAL.—I suppose that is all that is pertinent to read, to the question as to whether or not the plaintiffs here are holders for value.

By the COURT.—Entirely so.

On the former trial I held this was a non-negotiable note. I would suggest to counsel for the defendant, if they will raise the objection to the materiality of

(Deposition of A. C. Ruby.)

this testimony that this question might be passed upon, and, if the same conclusion is reached as before, it would curtail the case.

By Mr. ORLAND.—Under the rules of the Circuit Court this would be proper in rebuttal.

By the COURT.—My own question was, if, as a matter of fact, it would not be in time if, as a matter of law, it would be immaterial.

By Mr. ORLAND.—I did not anticipate the question being raised at this time—

By the COURT.—There is nothing to discuss unless you object to it.

By Mr. NEAL.—It was raised before on my objection to their testimony.

By Mr. ORLAND.—It was raised on the question to direct a verdict. Of course, if the Court please, there are two versions to that proposition. One would be that it is non-negotiable and [29] the other is, if it be negotiable it is a forgery which would change it and *invalidate* in the hands of anybody. One is a question of fact and the other is a question of law.

By the COURT.—It was so determined before. I held it was non-negotiable and submitted the other question to the jury.

By Mr. ORLAND.—I will object to it as incompetent and immaterial.

By the COURT.—Your objection is to any testimony tending to show that the present plaintiffs are *bona fide* holders on the theory that it is not a negotiable instrument.

(Deposition of A. C. Ruby.)

By Mr. ORLAND.—I do. I wish to state that I have not the authorities here at this time.

By the COURT.—He has the leading oar. I do not care to hear authorities on either side.

By Mr. NEAL.—I take the position that the negotiable instrument act as passed by the Supreme Court has not in any way changed the negotiability of this note; and I take it that there is only one or two things that can make a note non-negotiable as laid down by the Circuit Court of Appeals, and that is where there is a condition put on the note that it must be in some-way qualified promise to pay, or make a condition in the note; and the promise must be the promise of the makers of the note, and before the note is rendered non-negotiable there must be something on the face of the note which makes the payment under a condition or the payment uncertain. I think the Court will find that this is almost unanimous in the decisions I have been able to find. I will say that in [30] the preceding trial I did not anticipate that the note was non-negotiable, as I had the same note in the State of Washington and the Judge, Judge Rudkin, held that it was.

I would like to call the Court's attention to the note. The only thing on this note that is different from other notes is this: "After a good and satisfactory examination of the Stallion Ithos and recognizing, etc., we the undersigned subscribers hereby purchase said stallion and hereby authorize the delivery of said horse to any one of the subscribers hereto," and then follows the ordinary promissory

(Deposition of A. C. Ruby.)

note used in Oregon.

Now, the Court will notice, by an examination of that note, that there is nothing in there to make the promise conditional. The promise is absolute to pay at a certain date to the order of A. C. Ruby. Some rulings are to the effect that where a note is payable to order that it was intended to be a negotiable instrument. Here is a case in Texas, which gives many authorities and lays down many cases on this point; *Buchanan vs. Wren*, 30 S. W. 1077, 9.

“Appellant contends that the instrument sued on is not negotiable (1) because it provides for the payment ‘on or before’ a given date, thereby making the time of payment uncertain; (2) because the promise to pay is conditioned upon a consideration which had not then been, and might never be, received; and (3) Because the note shows on its face that it is given for rent of a certain place for the current year, and consequently for an unearned consideration, and one which was subject to be defeated by anything which lawfully disturbed the possession of the tenant, or which extinguished the title of the landlord during the term of the lease.”

I take it that the second and third propositions are [31] those which the Court held was not negotiable; and that possibly there might be a failure to deliver. In other words, it was an executory contract and not a note and the makers have a defense against A. C. Ruby. As I remember it, that is the ground on which the Court held the note was not negotiable. Now, the second and third contentions are so nearly the

(Deposition of A. C. Ruby.)

same that they will be considered together,—

By the COURT.—As I recall my views at the time, this instrument is not denominated a note, but a contract, and in addition to the provisions of the ordinary promissory note it contains two other stipulations or agreements; one is an agreement to purchase and the other is an agreement that the horse may be delivered to any one of the subscribers. For that reason it contains two agreements which are not contained in a negotiable instrument. Not upon any stipulations or conditions, but that it is an ordinary contract of sale to purchase rather than a mere promissory note. I suggest those views in order that you may confine your argument more specifically to them.

By Mr. NEAL.—I will read the note at issue in this case: On or before the 1st day of November, 1893, I promise to pay R. A. Rutherford, or order, the sum of \$1,500.00 for the rent of the Reavelle farm, in Washington County, Texas, for the year 1893; this note to bear ten per cent interest per annum after maturity until paid, and if suit has to be brought on same for collection, ten per cent additional for attorneys' fees; note to be paid in the city of Austin, Texas, S. R. Buchanan.

By the COURT.—If that is the instrument I do not think I care to hear that argument. [32]

By Mr. NEAL.—The decisions refer to executory contracts.

By the COURT.—If that is a general discussion of that, you may read it if you think it is in point,

(Deposition of A. C. Ruby.)

because it is the only point about which I entertain any doubt.

I think there is nothing in these decisions that would change the decision reached in the former trial. The instrument, taken as a whole, contains three obligations on the part of the makers: One is an agreement to purchase the horse, and it is just as solemn a promise as to pay money. The second is, that the horse may be delivered to anyone of the subscribers; and the third is to pay a certain amount of money. While it is true you cannot change the nature of an instrument by calling it a certain name, the name may be sometimes considered as to the intention of the parties. This is what is called a "Stockholder's Purchasing contract," and while this is not controlling, while the question is not entirely free from doubt, I shall hold it is non-negotiable. I think to hold it is negotiable and permit it to be used as a negotiable instrument is not sound. The objection will be sustained.

By Mr. NEAL.—I presume I have a right to offer these depositions for the purpose of showing plaintiffs are holders for value of this note.

By the COURT.—Is there any question, Mr. Orland, as to the plaintiffs being holders in due course for value, or *bona fide* owners.

By Mr. ORLAND.—We admit they are holders of this instrument. We will admit they are in the shoes of Ruby Co. [33]

By Mr. NEAL.—In order to save the record, I desire to offer in evidence the depositions of J. M.

(Deposition of A. C. Ruby.)

Leiter, Floyd J. Campbell and A. C. Ruby. The depositions tend to support the proposition that we are holders of these instruments and *bona fide* holders for value. And if they are material to any other issue.

By Mr. ORLAND.—We object to the introduction of these depositions. They only go to the extent of purchase by Leiter and Campbell of the note and the *bona fides* of the transaction, and if the note is not negotiable, that cuts no figure, and the other part we are willing to admit that they stand in the shoes of A. C. Ruby. [34]

By the COURT.—The objection will be sustained. To which ruling of the Court the plaintiffs then and there excepted, and which exception was duly allowed.

By Mr. NEAL.—I will read the note to the jury.
(Note read to the jury.)

We rest.

Defendant's Evidence.

[Testimony of Thomas S. Poindexter, in His Own
Behalf.]

THOMAS S. POINDEXTER, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. ORLAND.)

Q. Give your name to the stenographer.

A. Thomas S. Poindexter.

Q. And where do you reside?

(Testimony of Thomas S. Poindexter.)

A. Farmington, Washington, is my address.

Q. You are the defendant in this action?

A. Yes, sir.

Q. How long have you resided at Farmington?

A. For the past twenty-eight or twenty-nine years.

Q. Do you know a man by the name of Samuel K. Watson ?

A. I know a man by the name of S. T. Watson.

Q. Is this the gentleman sitting here?

A. Yes, sir.

Q. When did you first meet him?

A. In February, 1911.

Q. About what time, if you remember?

A. Along about the first week or so.

Q. State under what circumstances you met him.

A. I met him at the Hotel Farmington.

Q. And what conversation did you have with him?

[35]

A. He was introduced to me as a man having a stallion he would like to sell and wanted someone to assist him he said, in selling this stallion.

Q. Were there any arrangements made at that time about you assisting him in selling this stallion?

A. Well, at that time, I do not think so.

Q. Did you see the stallion?

A. I did during the day.

Q. Where was the stallion?

A. It was in the livery barn.

Q. Were there any negotiations that day with reference to the stallion?

A. That day, or the next day, Mr. Watson pro-

(Testimony of Thomas S. Poindexter.)

posed for me to help him sell the stallion and he said he would give me an interest in him or pay me \$5.00 a day.

Q. And what was the price of the stallion?

A. Twenty-eight hundred dollars.

Q. And what did he offer to give you?

A. He offered to give me one share of the seven for assisting him in selling the stallion.

Q. Did you accept the proposition?

A. I told him that I might help him sell the stallion, as I rather liked that kind of a stallion, but that I did not care to take any interest in the horse myself.

Q. Was there any further negotiations between you and Mr. Watson with reference to assisting him or selling the stallion?

A. The next day when I come in to town Mr. Watson said he had found a man to buy the rest of the horse and I told him to let him have it all as I did not care to have any interest in it, and I told him I did not care to give any money for a share, but of course, if he would give me a share, why I would take it.
[36]

Q. Was there any other talk or negotiations between you and Mr. Watson with reference to this transaction?

A. Yes, sir; when he told me Mr. Stroh wanted to take the rest of the horse and that he had some papers there that he would give as security—

By Mr. NEAL.—I move to strike the answer out as incompetent and immaterial.

By Mr. ORLAND.—He was giving a statement be-

(Testimony of Thomas S. Poindexter.)

tween Watson and himself.

By the COURT.—The motion will be denied.

To which ruling of the Court the plaintiffs then and there excepted, and which exception was duly allowed.

A. He stated he had those papers there and showed me, as well as I remember, a mortgage and note on some lands down by Winona or Endicott, and he told me, or asked me, what I knew about the mortgage and note being good; and I told him I did not know, that he would have to find that out himself.

Q. Do you know what was done with that note and mortgage?

A. No, sir; he kept on for three or four days, and I introduced him to several men and talked the matter quite a lot for three or four days, and he said that Stroh had agreed to take the rest of the horse and he was willing to accept his papers, and he said that Stroh was ready to make out the papers and he was ready to turn over the horse.

Q. Now, state what Watson said to you with reference to the condition of the horse also.

By Mr. NEAL.—I would like to ask the witness if the guaranty with the horse was in writing.

By the WITNESS.—I did not receive a written guaranty with the horse. [37]

Q. What was stated to you, Mr. Poindexter, with reference to the condition and breeding qualities of this stallion which he was offering for sale.

By Mr. NEAL.—I think I would like to show the

(Testimony of Thomas S. Poindexter.)

witness a paper, as I do not want to take any advantage of him.

I would like to ask the witness if he did not identify that paper as having been received with the horse.

By Mr. NEAL.—To the witness.

Q. I will ask you whether or not you identified this as the written guaranty which you received with the horse? A. I do not remember.

Q. Did you not remember in the trial before, that you received that guaranty?

A. I said that it looked like my signature, but I did not remember of signing it.

Q. Is that your signature there?

A. I could not say.

Q. You do not know whether it is or not?

A. No, sir.

Direct Examination.

Continued by Mr. ORLAND.

Q. You may state what conversation you had with reference to this horse in your negotiations with Mr. Watson with reference to purchasing or selling the stallion.

By Mr. NEAL.—I object to that for the reason that the guaranty was in writing and that is the best evidence; and the Court knows it was admitted at the trial of this case before, that there was a written guaranty with the horse, and that is the best evidence.

By the COURT.—It does not appear in this case that there was and [38] therefore the objection will be overruled.

(Testimony of Thomas S. Poindexter.)

To which ruling of the Court the plaintiff then and there excepted, and which exception was duly allowed.

A. Mr. Watson told me in assisting him to sell the horse that I would have to sign no papers whatever; that there would be no papers for me to sign, and he would give me a share in the horse. I told him that I did not care to take a share in the horse to pay any money, but would take a share if he would give it to me, but no other way.

Q. Now, when he asked you to assist in selling the horse, what did he tell you about his condition as to being a good breeding horse?

By Mr. NEAL.—The same objection.

By the COURT.—The objection will be overruled.

To which ruling of the Court the plaintiffs then and there excepted, and which exception was duly allowed.

A. He told me that the horse was a good horse, good for breeding purposes, a Percheron horse and so on; and I looked the horse over and asked him if the horse was not thick-winded, and he said that the horse had had the distemper, that he was an imported horse and had not gotten over it, but that was all that ailed the horse, and nothing more.

Q. Mr. Poindexter, you may look at that instrument, and state whether you ever saw it before; that is, prior to the time of the other trial.

A. The first time I ever saw this paper in this form was in August, 1911, sometime.

Q. And where did you see it?

(Testimony of Thomas S. Poindexter.)

A. In the bank at Farmington.

Q. Under what conditions did you see it at that time? [39]

A. The banker informed me that he had a note there and I went in to investigate and this is what I found.

Q. That is your signature, is it not?

A. Yes, sir.

Q. You may state the condition of that paper since you signed it.

A. When I signed the paper there was nothing made out in the way of a note. It was blank, only the printed part, and when the papers were made out he was ready to close the deal and turn over the horse; that Mr. Stroh had given a note and mortgage on some land.

Q. Mr. Watson told you that?

A. Yes, sir, and that he was not ready to make out the papers to finish up the deal, I says, "I have no papers to make out, and what have I got to do with that," and he says, "you will have to sign the contract before I can deliver the horse over to you." I said, "Very well," and "What kind of a contract have you got? I will look at it." He showed me and I told him that I did not like to sign any contract like that and asked him if he had any other. He told me that was the only contract that the company furnished and I told him I did not like to sign a blank like that, and I stood a little and says to myself that a big company like that would not try to beat a man, and I signed my name to the purchasing contract and

(Testimony of Thomas S. Poindexter.)

there was nothing in it but the blanks on that date.

Q. None of the writing from the top down was in there? A. No, sir, it was blank down there.

By Mr. NEAL.—We object to the question and answer upon the ground that the plaintiffs are *bona fide* purchasers for value.

By the COURT.—The objection will be overruled.
[40]

To which ruling of the Court the plaintiffs then and there excepted, and which exception was duly allowed.

Q. You may state if there was any indorsement upon the back of this instrument of any payment having been made thereon.

A. No, sir; nothing endorsed on it whatever. It was nothing but a plain stockholders' purchasing contract, and he stated, as I said before, that it was the only kind of a contract the company had.

Q. Is that Mr. Stroh's signature?

A. Yes, sir. He was there in the office and comes right up and sits down and signed his name.

Q. Had those words been in there when Mr. Stroh signed it?

A. No, sir; because I just got up from the table and he gets up and signs his name.

Q. What, if anything did you pay on that contract?

A. I did not pay any money to Mr. Watson. He said that he wanted to show Mr. Stroh that I had an interest in this horse, and I told him I did not know what way he was going to show it. He says, "I will make out a check and you sign it back to me, and

(Testimony of Thomas S. Poindexter.)

that will make a showing that you have a share in the horse."

Q. State if you ever saw that instrument before.

A. Yes, sir.

Q. From whom did you get it?

A. From Mr. Watson.

Q. Does that represent all the interest you had in this horse?

A. Yes, sir, that is all the interest I had whatever.

By Mr. ORLAND.—I offer this certificate in evidence as Defendants' Exhibit #1.

By Mr. NEAL.—I object to it as incompetent, irrelevant and immaterial. [41]

By the COURT.—The objection will be overruled.

To which ruling of the Court the plaintiffs then and there excepted, and which exception was duly allowed.

By Mr. ORLAND.—"Capital Stock, \$2800.00. Number of shares 7. Certificate of Stock. This is to certify that we have sold to Mr. Thomas Poindexter one share of stock valued at \$400.00 paid in full per share, in the Imported Percheron Stallion named Ithos, No. 53347 (83515). Dated at Farmington, State of Wash., this 14th day of Feb. 1911. The A. C. Ruby Co. of Portland, Oregon, by S. K. Watson, Agent."

Q. Now, Mr. Poindexter, did the inducement—or what representations were made to you by Mr. Watson which induced you to take this interest in the stallion, as to the condition of that horse and his value for breeding purposes.

(Testimony of Thomas S. Poindexter.)

By Mr. NEAL.—That is objected to as incompetent, irrelevant and immaterial.

By the COURT.—The objection will be overruled and you may have an exception.

Q. Is there anything further you have not stated with reference to the statements Mr. Watson made that induced you to enter into this agreement?

A. No, sir, only that he stated if there was anything wrong with the horse that they would replace the horse without any cost to us, and we told him that something seemed to be the matter with his wind, and he said it was only the distemper which he had not quite recovered from, but should anything come wrong with him, they would make it good without any expense to us. [42]

By Mr. NEAL.—I move to strike out all the evidence of the witness, the witness having testified that it was not in accordance with the contract.

By the COURT.—The objection will be overruled.

To which ruling of the Court, the plaintiffs then and there excepted and which exception was duly allowed.

Q. What did you find, if anything, to be the trouble with this horse as to his condition, after signing the papers?

A. We found the horse was very thick winded a few days after that.

Q. What do you mean by that?

A. When we took the horse out to move him around he blowed terrible and did not seem to be able to stand it. When we went to move him from one

(Testimony of Thomas S. Poindexter.)

place to another in standing him, he would have to go very slow, and if we seen anybody coming we would generally let him slow down and get his breath so that nobody would note it as they would not want to breed to him.

Q. What do you mean by getting his wind?

A. He was badly wind-broken.

Q. Did you breed the horse any that year?

A. Yes, sir; I think to twenty-eight mares during the season.

Q. Did you get any colts? A. Yes, sir, five colts.

Q. What reliance did you place upon Mr. Watson's statements with reference to this horse, in taking the horse, or an interest in the horse?

By Mr. NEAL.—We object, upon the ground that it is incompetent, irrelevant and immaterial, and upon the further ground that [43] the written guaranty is the best evidence.

By the COURT.—The objection will be overruled.

To which ruling of the Court the plaintiffs then and there excepted and which exception was duly allowed.

A. Well, I relied on Mr. Watson's statement that the horse was all right, and also on the guaranty.

By Mr. NEAL.—What statement did you rely upon?

By the COURT.—To the Witness. What do you mean when you say guaranty?

A. The guaranty that I signed before he could turn the horse over.

Q. This note, do you mean?

(Testimony of Thomas S. Poindexter.)

A. Yes, sir, this purchasing contract.

Q. Do you remember signing any other instrument except that one?

A. No, sir; as Mr. Watson told me I would not have any papers to sign.

Q. Do you know what became of the horse?

A. Yes, sir.

Q. How long did you and Mr. Stroh—in whose possession was this horse?

A. Mr. Stroh kept the horse.

Q. How long did he keep the horse?

A. He kept him until some time in July.

Q. And you bought him on February 14, 1911.

A. Yes, sir.

Q. And then what became of the horse?

A. Mr. Stroh taken the horse to Portland as they had told him if he brought the horse back—

By Mr. NEAL.—We object to what this witness told Mr. Stroh as hearsay. [44]

By the COURT.—The objection will be overruled.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

A. They told me.

Q. What did they tell you?

A. They told me if I taken the horse back to Portland they would take the horse back and pay all expenses and give us another horse.

Q. Now, what—or, who told you?

A. Ruby Company.

Q. Did they write you letters? A. Yes, sir.

(Testimony of Thomas S. Poindexter.)

Q. At the time Mr. Stroh took the horse back to Portland where—were you aware that you had signed a note for \$2,800.00? A. No, sir.

Q. When did you say you first became aware of that?

A. Some time in August, when it was presented to me at the Farmington Bank. That is the first I ever knew of such an instrument.

Q. Do you know what finally became of that horse?

A. The last I knew of the horse, he was still in Portland in care of Mr. Walker, a livery-stable man.

Q. Do you know whether that horse was offered back to Ruby & Company or not?

A. I was not there.

Q. You was not there when it was offered back to Ruby & Company? A. No, sir.

Q. Did you have any talk with Mr. Watson or Mr. Ruby in Portland when down at Portland?

A. Mr. Ruby was not there. [45]

Q. Did you have any conversation with Mr. Watson with reference to the return of this horse?

A. I do not think Mr. Watson was there either.

Q. With whom did you converse, if anybody?

A. Mr. Neal.

Q. Did you talk to anybody at the Ruby Company barn? A. I was not there.

Q. You do not know anything about the offer to return the horse to Ruby and company, only what Mr. Stroh told you? A. No, sir.

Q. But you do know that the horse was shipped to Portland, do you? A. Yes, sir.

(Testimony of Thomas S. Poindexter.)

Q. Was there any indebtedness owing by you to Ruby & Company upon this horse, or, for any other purpose? A. None whatever.

Q. What consideration, if any, have you received for this instrument? A. None whatever.

Q. Did you ever, or, what authority did you give to Mr. Watson, to endorse \$400.00 payment upon that note?

A. I never gave anyone that authority.

Q. And you had no knowledge of it until it was presented to you? A. No, sir.

Q. What authority did you ever give, if any, to anyone to fill in that note, or, make a promissory note of it? A. I never gave anyone that authority.

Cross-examination by Mr. NEAL.

Q. You were a witness in this case last November here, were you not? A. Yes, sir.

Q. And you examined at that time, Plaintiffs' Exhibit "A," [46] did you not? A. Yes, sir.

Q. And that is your signature? A. Yes, sir.

Q. Now, as I understood you, you read this over carefully before signing it? A. Yes, sir.

Q. And you did not understand at all you were signing a note, did you?

A. There was no note there; only a blank form.

Q. You examined everything on the paper, did you? A. Yes, sir.

Q. And when you saw this portion of this instrument, what did you think about it—"For value received I promise to pay to A. C. Ruby Company, the sum of blank dollars, payable at the Merchants' Na-

(Testimony of Thomas S. Poindexter.)

tional Bank, Portland, Oregon, in payments as follows: with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid the whole sum of both principal and interest to become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment, I agree to pay reasonable attorney fees." Did you see all that?

A. Yes, sir, all that was printed.

Q. And you thought you were merely signing a receipt for a horse? A. Yes, sir.

Q. And you did not understand it was a note?

A. No, sir, it was in blank form and Mr. Watson told me that I would not have to sign any note.

Q. Just tell the jury what you thought it was.

A. I told Mr. Watson that I did not want to sign a paper like that. [47]

Q. But what did you think you were signing?

A. I did not feel that I owed Ruby & Company anything at all, and I did not owe them one cent, but I signed the contract to receive the horse. Watson told me I had to sign the contract in order to receive the horse and I did look at it.

Q. I will ask you to examine Plaintiffs' Exhibit "F" in the former trial and state if that is your signature on that paper?

A. That looks like my signature but I never signed no such paper as that.

Q. That is your signature, is it not?

By the COURT.—Can you say whether it is your signature?

(Testimony of Thomas S. Poindexter.)

A. It looks like my signature.

Q. Is that not your signature?

A. It looks like it, but I do not remember signing any such a paper.

Q. Do you not know that is your signature?

By the COURT.—State whether or not it is your signature in your judgment.

A. It looks like my signature but I never signed any such a paper.

By Mr. NEAL.—I offer this in evidence as Exhibit “F.” Exhibit “F” reads as follows: “Farmington, Washington, 2/17th, 1911. This is to certify that we, the undersigned, have received from S. K. Watson for the A. C. Ruby Company, the Percheron Stallion Ithos No. 53347 (No. 83515) in good condition and every way as represented by S. K. Watson in the sale of said stallion. Thomas S. Poindexter. (Seal) Henry Stroh (Seal). Witness W. W. Kersten.” [48]

Q. Now, Mr. Poindexter, if this was a receipt for the horse, why was it you signed that paper? If Plaintiffs’ Exhibit “A” was a receipt for the horse why was it Plaintiffs’ Exhibit “F” was presented to you and you signed it? Can you explain that?

A. I never signed with any man by the name of Kersten whatever.

Q. You signed that paper, did you not?

A. No, sir, that I know of, I did not.

Q. You testified in this case with reference to that paper before? A. I suppose I did.

Q. Do you remember what you testified to at that time?

(Testimony of Thomas S. Poindexter.)

A. I said that I did not remember signing that paper.

Q. I want to call your attention to what you did say. While I am looking for that, I will ask you about this other paper. Now, I show you Plaintiffs' Exhibit "G" in the former trial and ask you to examine that paper and see if that written guaranty was received by you and Stroh upon the sale and receipt of the stallion in question.

A. I do not remember of signing this paper.

Q. Is that your signature? A. It looks like it.

Q. Do you know whether it is or not?

A. No, sir, I could not state for sure.

Q. Do you know your signature when you see it.

A. I do, yes.

Q. Is that it?

A. I say it looks like it, but I do not remember of ever signing that paper.

Q. I show you a postcard, dated Farmington, Washington, March 6, 1911, Plaintiffs' Exhibit "E," in the former trial, and ask you if you recognize your signature on that?

A. That is a different signature from what I always sign my name. [49]

By the COURT.—Is that your signature?

A. Sometimes I sign my name this way, and possibly that is it.

Q. Do you not know that on the other trial you admitted that was your signature? A. Yes, sir.

Q. I show you Exhibit "D," and ask you if that is your signature? A. It looks like it.

(Testimony of Thomas S. Poindexter.)

By Mr. NEAL.—I offer the postcards in evidence and will ask to have them marked as Plaintiffs' Exhibits "D" and "E."

Q. Did you sign an application for insurance on this horse?

A. Yes, sir, I think we taken out insurance.

Q. Examine that paper and see if you find your signature down on the bottom right-hand corner.

A. Yes, sir, I think it is.

Q. Do you know that is your signature?

A. Yes, sir. I remember signing a paper for that purpose.

By Mr. NEAL.—I now offer this application in evidence and will ask that it be marked Exhibit "A-2."

Q. Now, when did you sign the application for insurance with reference to the time you signed the receipt for the horse. Was it done at the same time or a different time?

A. Which one do you mean?

Q. I mean the paper you signed for the insurance. Did you sign that at the same time you signed the receipt for the horse? A. I did not say I signed it.

Q. Did you not say that was your signature?

A. I said it looks like it. [50]

Q. Did you sign any other paper at the time you signed the receipt for the horse, or did you see only the one paper?

A. I signed this paper, but I do not remember signing any other on that date.

Q. And where were you when you signed that?

(Testimony of Thomas S. Poindexter.)

A. I could not say just where I was, but I was in the town of Farmington.

Q. You do not know whether you were in the hotel or not?

A. No, sir, I could not say, but I think I likely was.

Q. Do you know who was present when you signed that? A. No, sir, I could not say.

Q. Now, calling your attention to Plaintiffs' Exhibit "G," which is the guaranty you received on the horse, I will ask you if you did not testify at the former trial that you received a written guaranty on the horse? Do you remember?

A. I could not say now that I did.

Q. You could not say now that you testified to that before? A. No, sir.

Q. Is your memory not as good now as it was last November? A. Well, I suppose it was.

Q. You know, do you not, whether you had any written guaranty or not?

A. I think he gave us a guaranty.

Q. Do you not know that he did?

A. But as I tell you, I do not remember of signing any guaranty.

By the COURT.—You think he gave you a printed guaranty.

A. I think we did have one, but that is all I remember. I do not remember of signing any guaranty. [51]

Q. Now, as I understood you, you only signed one paper, you say now, outside of the application for insurance.

(Testimony of Thomas S. Poindexter.)

A. Yes, sir; that is all I remember signing was that contract. He told me I would not have any papers to sign at first.

Q. Now, Mr. Poindexter, I call your attention to this question which was put to you on the trial of this case last November and ask you if you did not answer the following questions in the following way:

“Q. I now show you Plaintiffs’ Exhibit ‘G’ and ask you to examine that and state if you recognize the two signatures on the left-hand corner,” and you answered: “Yes, that looks like mine.”

A. I said it looked like mine.

Q. I then asked you: “Is that not your signature?” and you answered, “It looks like it; yes, sir,” “And that is Mr. Stroh’s” and you answered, “Yes, sir, it looks like it.” So, then, you at least did sign two papers and this guaranty?” and you answered, “Yes, sir.”

A. I said it looked like my signature.

Q. You say at this time you do not think you signed that guaranty?

A. I say I do not ever remember of signing that.

Q. Did you say at the former trial that you signed it?

“Q. So, then, you did at least sign two papers?” and in answer to that question you answered, “Yes, sir.” There is no equivocation about that, is there?

A. I might have misunderstood it.

Q. I will ask you if you did not answer this question: “And you signed that the same day you did Exhibit ‘A’?” and you answered: “Yes, sir, I guess

(Testimony of Thomas S. Poindexter.)

I did; that is the only day I signed." Do you remember that testimony? [52]

A. I answered, "Yes, that is the only day I signed any papers."

Q. You remember, now, signing the application for insurance on February 17, and the purchase was made on the 14th.

A. Yes, sir, but the insurance seems to be dated before that; the 11th, I think.

Q. Now, I want to get this clear. I want to know what you want the jury to understand; whether you signed these papers I have shown you, Plaintiffs' Exhibit "A," "F," "G"; I want you to tell the jury now whether you signed all three of these, or just the one, Plaintiffs' Exhibit "A."

A. Well, sir, I do not remember anything about that paper whatever.

Q. Referring to Exhibit "F"?

A. Yes, sir; and this paper I do not remember signing that, but it looks like my signature. I think he gave us that guaranty but I do not remember of signing it.

Q. Then you think you were mistaken about it awhile ago when you said you did not sign it?

A. I said about the paper.

Q. You testified in November that you signed it?

A. I did not aim to.

Q. Did you not testify positively that it was your signature and Stroh's signature on that contract?

A. I said it looks like it.

Q. You testified in November that you signed it?

(Testimony of Thomas S. Poindexter.)

A. I did not aim to.

Q. Did you not give this answer in answer to this question: "So then you did at least sign two papers in connection with this guaranty?" Answer, "Yes, sir."

A. I did not aim to. I meant to answer just like this here.

Q. You have refreshed your memory somewhat since the other trial?

A. Somewhat, yes, sir. [53]

Q. Have you discussed the matter of this instrument here, as to its condition and contents, since you signed it, the Exhibit "A"?

A. No, sir, I think I gave about the same evidence as I did before.

Q. You testified before that you never saw Exhibit "A" until it came to the bank for collection.

A. Yes, sir; that is what I swore to before.

Q. You are positive about that now?

A. I said not in that form. It was not filled out.

Q. You claim you testified you saw it in the form it is with the ink portion left out.

A. Yes, sir.

Q. Did it not occur to you to be rather a piece of careless business to sign a paper in that form?

A. No, sir; I stopped there and studied about it awhile and thought that a big company would not try to beat a man. I did not like to sign the paper before and I asked Watson if he did not have any other form and he said that he did not, and I studied about it awhile and finally concluded that a big company like that would not beat a man and that I

(Testimony of Thomas S. Poindexter.)

would sign it. I did not think about a man trying to beat me.

Q. You thought you were getting \$400.00 for nothing?

A. I thought I was getting \$400.00 in this way. I did not do very much and I did not do anything to speak of, and I did not expect anything, but he kept hanging on to give me a share in the horse, but I did not care for a share in the horse, all I wanted being that the horse should be in the country and I told him that—

Q. You liked the looks of the horse, did you not?

A. Yes, sir.

Q. Where was you when you signed Plaintiffs' Exhibit "A"? A. In the hotel office. [54]

Q. And who was present?

A. Watson, Haines, Stroh and myself.

Q. And was Mr. Sullivan there?

A. No, sir, I do not know him.

Q. Do you remember seeing that gentleman there? That is Mr. Sullivan. A. Yes, sir.

Q. I will ask you if at the time the note was presented to you for signature, that if Mr. Watson did not write it out on the showcase in your presence, and in the presence of Sullivan when no one else was present except the three of you, and after it was written out for signature you objected to signing it and said, "If I sign that I will be liable for the full \$2,800.00." A. No, sir, I did not.

Q. I will ask you, further, if you did not know that the horse was being sold for \$2,800.00.

(Testimony of Thomas S. Poindexter.)

A. Yes, sir.

Q. And you understood that Ruby & Company were to receive \$2,800.00 for the horse less the \$400.00?

A. I knew at that time that Stroh was to get six shares.

Q. And I will ask you if you did not understand that you were to get one share for signing the joint note. A. No, sir.

Q. I will ask you if you did not state at that time that if you signed it, you would be liable for the full amount. A. No, sir.

Q. I will ask you if you did know it was a joint note.

A. Yes, sir, I knew; but it was not filled in. I thought that it could be filled in and that is why I objected to it. [55]

Q. Now, why was it that you did not ask him to fill it in before you signed it?

A. Because I never dreamed of such a thing.

Q. Are you in the habit of signing blank notes?

A. No, sir, because I do business for cash and give no notes to anybody.

Q. You made a trip down to Portland in 1912?

A. Yes, sir.

Q. Prior to your coming down there, you had been sued by Henry Stroh, had you not?

A. No, sir, I never had any papers served on me.

Q. You did not know that you had been sued?

A. No, sir.

Q. I show you Plaintiffs' Exhibit "I" and ask

(Testimony of Thomas S. Poindexter.)

you to examine the signatures on the bottom there and state if you signed that.

A. Must I answer before I read it or not? It looks like my signature. I would like to see the paper.

Q. We produced it here at the other trial. That is it, is it? A. That is my signature.

By Mr. NEAL.—We offer it in evidence and ask to have it marked Plaintiffs' Exhibit "I."

(By Mr. ORLAND.)

Q. Under what conditions was this instrument signed by you and Mr. Stroh?

By Mr. NEAL.—I object to the question as the document shows on its face what it is for.

By the COURT.—Let me have it, please.

By Mr. ORLAND.—That was a matter of compromise and settlement and it [56] does not pertain to the issues here.

By Mr. NEAL.—You do not claim it is a matter of compromise in this case.

By Mr. ORLAND.—No, sir, it is entirely foreign to this.

By the COURT.—The objection will be overruled.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

A. This paper was under the condition that I should make settlement with Ruby & Company or Leiter and Campbell. That paper was made out under conditions that if I should make settlement with them, then I was to pay for the horse and Stroh

(Testimony of Thomas S. Poindexter.)

would turn the horse over to me; and when Stroh went to Portland and came back to Farmington, I had no interest in the horse whatever, but under the conditions that I make a settlement with Leiter and Campbell of this note I was to turn over, he was to turn over the horse to me so that I would get something for my money.

By Mr. NEAL.—It shows that these two parties recognized this note, if the Court please.

By Mr. ORLAND.—It was only when Mr. Poindexter thought he was stuck for this note that this agreement was made, and that he would like to get out of it some way.

By the COURT.—The objection will be sustained.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

(By Mr. NEAL.)

Q. I want to ask the witness further in reference to the [57] guaranty, Plaintiff's Exhibit "G." I find some more testimony. I will ask you if you were not asked this question: "I would like to ask the witness with reference,—was that in writing or a verbal guaranty." It was verbal. "Q. Did you afterwards get a written guaranty?" Answer: "Yes, sir, he gave us a written guaranty." What did you refer to, Plaintiffs' Exhibit "G"?

A. I referred to Plaintiffs' Exhibit "G."

Q. I will ask you if at the time you came to Portland, if you remember the circumstances of requesting me to wire A. C. Ruby who was then in New

(Testimony of Thomas S. Poindexter.)

York, whether or not he would give you another horse in the place of the one Stroh had in case you made a settlement with Mr. Stroh.

A. Yes, sir, I read your telegram to Mr. Ruby.

Q. And do you remember me showing you this telegram, marked Plaintiffs' Exhibit "P," which was received from Mr. Ruby?

A. I think you presented such a thing to me.

By Mr. NEAL.—I now offer it in evidence as Plaintiffs' Exhibit "P."

Q. I now show you Plaintiffs' Exhibit "K" at the former trial.

Q. I show you Plaintiffs' Exhibit "K" and ask you if that is the telegram you received from Mr. Ruby.

A. I suppose it is. I got two or three letters and two or three telegrams from Mr. Ruby, but I had no horse or interest in any, nor nothing whatever to trade.

Q. Then why, I ask you, did you ask me to telegraph to Ruby if you had no horse? Tell the jury about it.

A. When I found out in August, I found out that they had a note, I saw that it might cost me something to get out with a lawsuit and so I investigated to see,—so that if it would cost me \$500.00 or \$600.00, thought it would be the best thing to do, was to go to Portland and make a compromise [58] settlement, as I saw I had got into it when I found out the note was fixed up against me in this kind of a shape, and that is the way I went to Portland.

(Testimony of Thomas S. Poindexter.)

By Mr. ORLAND.—Why have you not produced the original telegram, Mr. Neal?

By Mr. NEAL.—Because it is in New York. I will offer this telegram in evidence.

By the COURT.—You may be relieved of taking exceptions, and all adverse rulings will be deemed to have been excepted to.

By Mr. NEAL.—I will read Plaintiffs' Exhibit "R," a postcard addressed to A. C. Ruby Company at Portland, Oregon, reading as follows:

"Farmington, Wash., 3-6-11. A. C. Ruby & Co., Portland. Dear Sir: I written to you about a week ago in regard to a note given Mr. Watson when here by Henry Stroh for ins on that Percheron Colt we bought he wants to take up the note so please send it here for collection or let me hear from you at once. Yours truly, T. S. Poindexter Sec."

Plaintiffs' Exhibit "D" reads as follows: "Mr. S. K. Watson, Moscow, Idaho (forwarded to Garfield, Washington). Farmington, Was., 2-25-11. Mr. S. K. Watson. Dear Sir: Send Stroh's note here to me or to the bank and he will pay it the Inst note. I will also write to Ruby & Co., at Portland as I don't know where you are for sure. Horse is fine. Yours truly, Thos. S. Poindexter.

By Mr. NEAL.—I will read now Exhibit "A" to the jury: [59]

"Stockholder's Purchasing Contract. Feb. 14th, 1911. After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53,347 owned by The A. C. Ruby Co., of Portland, Oreg., and recog-

(Testimony of Thomas S. Poindexter.)

nizing his value as a means of improving our horse stock, we the undersigned subscribers, hereby purchase said stallion of The A. C. Ruby Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

\$2800.00. Portland, Oregon, Feb. 14th, 1911.

For value received, I promise to pay to the order of The A. C. Ruby Co., the sum of Twenty-eight Hundred 00/100 dollars, payable at the Merchants National Bank, Portland, Oregon, in payments as follows: One Thousand and no/100 Dollars, Oct. 1st, 1911; Nine Hundred and no/100 Dollars, Oct. 1st, 1912; Nine Hundred and no/100 Dollars, Oct. 1st, 1913; with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid, the whole sum of both principal and interest to become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay reasonable attorney fees. Thos. S. Poindexter. Henry Stroh." And on the back is endorsed as follows: "2/17/1911. Paid by Thos. S. Poindexter \$400.00 one third to be applied on each of the three payments."

Exhibit "G" reads as follows: "The A. C. Ruby Co. Importers and Breeders of Percheron, Belgian, Shire and German Coach Stallions. 900 Sandy Road, Portland, Oregon. References: American National Bank, Pendleton, Oregon, Merchants National Bank, Portland, Oregon. Portland, Oregon, February 14th, 1911.

KNOW ALL MEN BY THESE PRESENTS:

(Testimony of Thomas S. Poindexter.)

That we have this day sold the Imported Percheron Stallion named Ithos [60] No. 53347 (83515), to the following Persons. Thos. S. Poindexter, P. O. Farmington, Washington, Henry Stroh, P. O. Farmington, Washington. Purchase price Twenty Eight Hundred — 00/100 \$2800.00 Dollars. GUARANTEE—If the above stallion does not give satisfaction in every way and get sixty per cent of the producing mares, that are properly bred and returned for second trial at the end of the third week, in foal, during the breeding season, commencing April 1st and ending August 1st, we agree to furnish another stallion of the same price and quality upon delivery of the above named stallion in as good and sound condition at the end of the first year as he is at present, to our barns in Portland, Oregon. If the stallion above named should not be a breeder or should not be true to pedigree furnished, we agree to furnish another stallion of the same price and quality, upon delivery of the above named stallion in as good condition as he is at present, at our barns in Portland, Oregon, and in consideration thereof the undersigned purchasers hereby waive any and all damages, or rights of action for damages, created by statute or otherwise, that they or either of them might have by reason of the failure of said stallion to be a breeder or true to pedigree. Should the above-named stallion not fulfill this guarantee, we will gladly replace him according to the terms of this contract, but will not be liable for any damages or offsets that might be claimed by the purchasers, or any verbal or written

(Testimony of Thomas S. Poindexter.)

contracts or changes made by agents. And the undersigned purchasers hereby acknowledge that they have read this contract and that no representations or guarantees were made to them, as an inducement to purchase said [61] stallion, or otherwise; except those contained in this instrument, and it is understood that The A. C. Ruby Co., is not to be held liable upon any other warranty or representation except those contained in this instrument.

In case of the above-named stallion's death, or any ailment that would render him unfit for services within four years from date we agree to furnish another stallion of the same price and quality, providing the purchasers keep said stallion insured in some reliable insurance company for \$1000 and collect said insurance and turn same over to The A. C. Ruby Co., upon delivery of horse. In case of the death of said stallion, as aforesaid, the undersigned purchasers are to turn over said insurance money to The A. C. Ruby Co., as soon thereafter as they are notified to select another horse, and on failure so to do it shall be conclusively presumed that they do not want another horse, and that they have elected to keep the insurance money in lieu thereof. The A. C. Ruby Company by A. C. Ruby. (Signature of Purchasers and address.) Accepted by Thos. S. Poindexter, 1 share, Farmington, Washington, Henry Stroh, 6 shares, Farmington, Washington."

I will now read Exhibit "P," being a telegram from A. C. Ruby, from New York, on a day letter blank of the Western Union Telegraph Company.

(Testimony of Thomas S. Poindexter.)

“New York, Jan. 5, 1912. Wilson and Neal, Room 631, Chamber of Commerce, Portland, Oregon. I will give them any horse they want will guarantee satisfaction I would not pay any costs or expense and would want everything cleared up and cash or notes secured will hardly be home before eleventh [62] if not settlement made you should get service on them in Portland. A. C. Ruby. 6:14 P. M.”

Exhibit “K” is another,—or a letter from Mr. Ruby to Mr. Poindexter, and reads as follows:

“Portland, Ore., Jan. 25, 1912. Mr. Thos. S. Poindexter, Farmington, Wash., Dear Sir: My new shipment of horses are now at home and getting in good shape. Come down and make your selection, according to agreement. I have some of the best horses in this lot that I have ever imported. Of course they don’t look as well now as they will in a short time, as they were 27 days in transit. The sooner you come, the more you will have to select from. I will be away the first week in February. You had better let me know when you are coming. Respectfully yours.”

A. About Mr. Stroh giving the note, I would like to state in regard to those postcards. He gave a note as to his part of the insurance.

Q. I will ask you, Mr. Poindexter, if it is not a fact that at the time you was in Portland that you also had me wire to Forney & Moore, attorneys in this case, for the purpose of finding out what the costs were in this case in order that it might be settled, and I received their answer and figured up the entire

(Testimony of Thomas S. Poindexter.)

amount with costs and interest and you agreed to send me a check in full settlement when you got home.

By Mr. ORLAND.—We object as incompetent, and, it is a matter of compromise settlement.

By the COURT.—Sustained. To which ruling of the Court, the plaintiffs then and there excepted, and which exception was duly allowed. [63]

Q. Now, at the time you signed the application for insurance you paid your part of the premium on this policy in the case, in cash.

A. I paid my part; yes, sir.

Q. And Mr. Stroh gave a note for his part?

A. Yes, sir.

Q. Now, Mr. Poindexter, you never found out if there was anything wrong with this note until after you found out that Stroh disposed of all his property and was not responsible, and that you were going to have to pay the *entire* of the note?

A. I do not understand the question.

Q. You never found out there was anything wrong with this note until after you found out that Stroh had disposed of all his property and was not responsible, and that you were going to have to pay the entire amount of the note?

By Mr. ORLAND.—We object on the ground that it is incompetent and immaterial; and upon the further ground that there is no evidence here that Mr. Stroh has ever at any time disposed of his property.

By the COURT.—Sustained. To which ruling of the Court the plaintiffs then and there excepted and which exception was duly allowed.

(Testimony of Thomas S. Poindexter.)

Q. I will ask you if you did not tell me in Portland that Stroh had disposed of his property and it was up to you to settle the matter?

A. What is the question?

Q. Did you not tell me in Portland when you were there [64] that Stroh had disposed of all his property and it was up to you to settle the matter?

A. I could not say whether I did or not.

Q. Mr. Ruby has at all times offered to give you another horse, has he not?

A. He has offered several times to give me another horse but I never had any horse to trade.

Q. You had this one, did you not?

A. I did not. I turned in my share over to Stroh when he went to Portland.

Q. I will ask you if in the agreement you had with Stroh, Plaintiffs' Exhibit "I" for identification, he did not transfer title of his interest to you?

By Mr. ORLAND.—We object as incompetent and immaterial.

By Mr. NEAL.—I now offer this for the purpose of contradicting the witness when he said he never had any horse, as it shows there it was transferred to him absolutely.

By the COURT.—Mr. Orland, have you any objection to the instrument going in.

By Mr. ORLAND.—Certainly I have, because the instrument is the best evidence of that, and it has been ruled out as being a compromise. There is a condition in there also as to the title.

By the COURT.—Proceed with your other mat-

(Testimony of Thomas S. Poindexter.)

ters. I will look over this.

Q. Mr. Poindexter, I will ask you if you ever made a trip down to Colfax to see S. K. Watson after you signed Plaintiffs' Exhibit "A." [65]

A. I do not remember.

Q. Do you not know that you did?

A. I might have went but I do not remember.

Q. At that time, did you not tell Mr. Watson that Mr. Stroh had disposed of all his property and you asked him if you could get Stroh to secure the amount of the liability that he would relieve you from liability? A. I do not remember.

Q. Do you remember seeing Watson down at Colfax? A. No, sir.

Q. Did you receive a statement from Mr. Watson in regard to it at that time?

A. I do not remember of any.

Q. How long after you had the horse was it that you found out he was worthless?

A. I cannot say for sure. We depended on his being as Watson stated; that he had the distemper and we kept waiting for him to get over it and finally Stroh told me when we went to take him over to Tekoa he could not take him to stand as he was badly wind-broken.

Q. How long did you keep the horse?

A. Until July, 1911.

Q. The same year you bought him?

A. Yes, sir.

Q. And I believe you testified that you did not know of it, what Stroh did with the horse after he

(Testimony of Thomas S. Poindexter.)

took it to Portland?

A. No, sir, I do not know only just what he told me.

Q. Mr. Poindexter, did you ever notify Mr. Leiter that the signature on this Exhibit "A" was a forgery; that you had never signed it at all?

A. I could not say.

Q. Did you claim it was a forgery at any time; or did [66] you always claim that you signed it?

A. I claimed it was not filled in when I signed it.

Q. But your signature was on it? A. Yes, sir.

Q. I want to show you a letter dated September 4, 1911, and addressed to J. M. Leiter, and ask you to examine the signature on the back and see if you recognize that.

A. Yes, sir, that looks like mine.

Q. It is yours, is it?

A. Yes, sir, it looks like mine.

Q. And it is yours, is it not?

A. Yes, sir, *I written* that just the same as I stated now.

By Mr. NEAL.—I offer this in evidence as Plaintiffs' Exhibit "M." Exhibit "M" reads as follows: Farmington, Washington, Sept. 4th, 1911. Mr. J. M. Leiter, Dear Sir: I received a notice from you to settle some interest on a note given to A. C. Ruby & Co., Portland, signed by me and Henry Stroh. Now, I paid no attention to it as I did not owe the Co. anything. Now, then since then that note has been sent here for the interest which I refused to pay. Now, I just thought I would explain the matter a little to you and you could do as you please. A. C.

(Testimony of Thomas S. Poindexter.)

Ruby's man Watson came here with a horse to sell and offered several men here to help him sell the horse and he would give them one share, the horse to sell at \$2,800 dollars of \$400 per share, so he made the sale of the horse of 6 shares to Henry Stroh and told me that Stroh gave him as security a note and mortgage on a ranch so all the paper that I signed was just the contract and [67] their agreement which was necessary to accept the horse but never signed any note at all. So if he has my name on a note it is forged there by this man Watson or their Co. because I never saw such a note before until it came here for collection. T. S. Poindexter.

Q. Now, Mr. Poindexter, I believe you said that this horse only got five colts during the season.

A. Yes, sir, that is what Stroh said.

Q. How many did you get? A. I got two.

Q. What is your business? A. Farming.

Q. You have quite a number of brood mares, have you not? A. I breed one or two a season.

Q. You understand the English language well, do you not, so far as reading and writing is concerned?

A. Fairly well; yes sir.

Q. I show you a telegram dated January 29, 1912, and marked for identification Exhibit "L" at the former trial, and ask you if you received that telegram from Mr. Ruby. A. I could not say.

Q. Do you recollect receiving it?

A. No, sir, I did not keep them so I do not remember.

(Testimony of Thomas S. Poindexter.)

Q. You did not pay any attention to that kind of a telegram?

A. I did not as I did not have any horse to trade.

By the COURT.—I will sustain the objection to the contract, Exhibit “I,” which I took under advisement. To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed. [68]

Redirect Examination by Mr. ORLAND.

Q. Do you know whose handwriting that is,—who filled that blank out, referring to Defendant’s Exhibit “A” the application for insurance?

A. No, sir, I could not identify the writing.

Q. It is not your handwriting? A. No, sir.

Q. Was that insurance policy required by Mr. Watson? A. Yes, sir.

Q. Do you know where you were when you signed that application?

A. No, sir; I could not say for sure.

Q. Did you go with Mr. Watson to sign it or did Mr. Watson bring it to you to sign?

A. I do not remember.

Q. But you know you made the application for insurance as was required? A. Yes, sir.

Q. Where were you when Plaintiffs’ Exhibit “A,” the note in controversy, was signed?

A. In the hotel office in Farmington.

Q. Who is the proprietor of the hotel?

A. W. D. Haines.

Q. Who was present at that time?

A. Mr. Stroh, Haines, Watson, and myself.

(Testimony of Thomas S. Poindexter.)

Further Cross-examination by Mr. NEAL.

Q. I would like to ask you if it is not a fact that you agreed with Mr. Watson that if he would pay the expenses of yourself and Mr. Stroh to Portland, that you and Stroh would go down to Portland and pick out another horse in exchange for the one you had? A. At what time was that?

Q. Sometime, I think, in October or November last year [69] prior to the commencement of this action in 1911. A. In 1911 did you say?

Q. Yes, sir, in 1911.

A. I turned my share over *the* Stroh. I do not remember.

Q. You do not remember that? A. No, sir.

Q. I will ask you further if it is not a fact that you told Watson at that time that if he would deposit in the Bank at Garfield, Washington, the sum of \$40.00 for the purpose of paying your expenses to Portland that you and Stroh would go down and select another stallion?

A. I think we did early in the season.

Q. You remember that you did agree to that?

A. Yes, sir, something to that effect.

Q. And you remember that Watson placed the money in the Bank at Garfield? A. Yes, sir.

Q. And you also remember that the money was transmitted from that bank to the Bank of Farmington for you? A. I think so, yes, sir.

Q. Now, do you remember last November at the trial that you testified at that trial to that which is not now true? In other words, you have changed

(Testimony of Thomas S. Poindexter.)

your testimony in reference to this particular point.

A. I could not say.

Q. Anyway, at this time you admit that was the fact.

A. I think he left the money in the bank early in 1911.

Q. Then you refused to go to Portland?

A. He did not want us to go until after the season was out.

Q. You refused to go?

A. Mr. Stroh went down to Portland with the horse.

Q. At that time? [70]

A. I do not know. I do not know what date that is.

Q. Along about October, 1911.

A. Stroh already had the horse in Portland at that time.

Q. I will ask you if you did not agree with Watson that if he would pay your expenses to Portland and place the money in the Bank of Garfield that the two of you would go down and select another stallion in the place of this one.

A. We might have done so, yes, sir, before that time.

Q. And then when that was done you refused to go?

A. I never went at that time but Stroh did.

Q. You or Stroh never went after that time?

A. Mr. Stroh went down two or three times for that purpose.

Q. Did he ever go to the Ruby barn at any time, if you know? A. I was not there.

(Testimony of Thomas S. Poindexter.)

Q. Anyway, you refused to go?

A. He went down for that purpose.

Q. And you refused to go?

A. I did not have any horse and I did not need to go.

[Testimony of W. D. Haines, for Defendant.]

W. D. HAINES, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. ORLAND.

Q. You may state your name. A. W. D. Haines.

Q. And where do you reside?

A. Midland Falls, Washington.

Q. Where did you reside during the month of February, in the year 1911?

A. At Farmington, Washington.

Q. What was your business at that time?

A. I was manager of the hotel at Farmington.

Q. Are you acquainted with Mr. Poindexter?

[71] A. Yes, sir.

Q. And with Mr. Watson? A. Yes, sir.

Q. Just state if you saw Watson during the month of February, 1911. A. Yes, sir.

Q. Where did you see him?

A. He came to the hotel, if I remember right, and registered on February 5th.

Q. Did you have any conversation with him with reference to his business?

A. Not directly, but he made inquiry of me as to who the good reliable farmers were around there.

Q. Did he state what he wanted to do?

A. No, sir, but I knew that he had a horse there.

(Testimony of W. D. Haines.)

Q. Did you have any conversation with him with reference to selling the horse, or anything of that kind? A. No, sir, I think not.

Q. Mr. Haines, do you remember on or about February 14th of Watson and Poindexter being in the hotel at the time some instrument was signed?

A. Yes, sir, they was there with an instrument. I do not remember the date.

Q. Who was present at that time?

A. Stroh, Poindexter, Watson and myself.

Q. Was there anyone else present? A. No, sir.

Q. Do you know what kind of an instrument it was that was signed?

A. I heard them talking regarding a contract and my recollection is that Poindexter asked Watson if he had any other style of a contract from the one that he had.

Q. Did you see the instrument?

A. I noticed the heading of it as I was passing by.
[72]

Q. You may look at Plaintiffs' Exhibit "A" and tell us if that is the instrument that you saw lying there.

A. Yes, sir, something similar to that but I did not notice any part more than the heading.

Q. Was there any other conversation between Poindexter and Watson other than what you have detailed?

A. It was just merely in regards to the contract; if there was any other form and he was informed that was the only contract they had.

(Testimony of W. D. Haines.)

Q. Do you know whether there was any writing in that body of that? A. I do not know.

Q. Was that some time after this instrument was signed? By the way, did Poindexter and Stroh sign that there together? A. Yes, sir.

Q. Now, after signing it, did you have any conversation with Watson with reference to the transfer of this stallion?

A. We had several conversations before and afterwards. Mr. Watson asked me a number of times if Poindexter was a responsible man, and he came to me one day and says, "Some one is going to get the horse," and on the day of the sale he says, "I have turned the horse over without a dollar, but I have got good notes with a mortgage," and he also informed me that he had sold a share to Poindexter, and I asked him how he fixed it up with Poindexter and he said that was Stroh's part, that Poindexter paid cash; he did not give me a note.

Q. Poindexter did not give a note?

A. Yes, sir, Poindexter did not give his note.

Q. You have known Mr. Poindexter for some time?

A. Yes, sir, twenty-six years, I should judge.

Q. I believe that you are in some way related?

[73] A. Yes, sir, I am his brother in law.

Q. Is that your reason why you were instrumental in knowing what Poindexter did?

A. Well, in a way, yes, sir. I was interested.

Cross-examination by Mr. NEAL.

Q. Where was Stroh and Poindexter when they signed Plaintiff's Exhibit "A"?

(Testimony of W. D. Haines.)

A. At the writing-table alongside of the wall in the lobby.

Q. And where were you?

A. I was at various places; in back behind the counter sometime, and then over to the stove in front of the writing-table, and I remember going into the washroom, which leads right by the end of the table.

Q. And where was the paper then?

A. The paper was on the table.

Q. Did you see what was on it?

A. On the top was purchasing contract, or something like that.

Q. You do not then know, do you, what was in the paper?

A. I just merely saw that it was a contract.

Q. You testified before in this case?

A. Yes, sir.

Q. And you testified before that you were away that far (indicating from the witness chair to the table) when they signed it? A. Yes, sir.

Q. And you undertake to tell the jury that you could see what was on the head of that paper from that distance?

A. I was passing by and glanced at it several times.

Q. Do you know whether that contract was there at the same time? (Showing witness a paper.)

A. I could not say. [74]

Q. Do you swear positively it is this one or this one? (Showing witness two papers.)

A. Positively this one.

Q. You are a brother in law of Mr. Poindexter's?

(Testimony of W. D. Haines.)

A. Yes, sir.

Q. But you are not able to say whether there was any writing on that when you saw it? A. No, sir.

Q. You passed right by here and saw the purchasing contract and Mr. Poindexter is your brother in law and you watched to see what he signed and you did not see what was on the paper?

A. No, sir, I did not pay much attention.

Q. You saw them both sign it?

A. I saw them both sit up to the table and take the pen in their hands.

Q. That is his signature on those?

A. I saw Poindexter sign it.

Q. Did you see Poindexter and Stroh sign it?

A. Well, yes,—I might say I saw them both sign it.

Q. When was it you had the conversation with Mr. Watson after the paper was signed?

A. It was after the paper was signed.

Q. This paper dated February 14th, is that the time they signed? A. I do not remember.

Q. Did you see them sign this paper?

A. I did not, no, sir.

Q. Did you see him sign that paper, referring to Plaintiff's Exhibit "F"? A. I did not.

Q. Is that Mr. Poindexter's signature?

A. That looks like it. [75]

Q. You know it pretty well, do you not?

A. Well, yes, that looks pretty much like it.

Q. Now, you say you had a conversation with Mr. Watson in reference to the mortgage that Mr. Stroh had given him? A. Yes, sir.

(Testimony of W. D. Haines.)

Q. When was that with reference to the time you saw Mr. Poindexter and Mr. Stroh sign the note?

A. I am not sure, but I think it was after it was signed, when he made the statement to me in regard to Mr. Poindexter paying cash for his share.

Q. You say that you saw Mr. Poindexter sign this note, and then you say that Mr. Poindexter did not give a note.

A. I am sure it was after the papers were signed.

Q. Do you know when the horse was turned over?

A. I do not know, but Mr. Watson left that same afternoon.

Q. Then the conversation with Mr. Watson was on the same afternoon when he left Farmington?

A. Yes, sir.

Q. You do not know the date Mr. Watson left, do you? A. No, sir.

Q. He did not leave Farmington until after he turned the horse over, did he? A. No, sir.

Q. Now, he did not leave until he got this receipt dated February 17th, did he? A. I could not say.

Q. You kept the hotel register at the hotel?

A. Yes, sir.

Q. Did you not testify before that Mr. Watson left on February 17th?

A. I do not know. My hotel register would not show the date he left.

Q. Did you have any record of when he settled his bill? [76] A. No, sir.

Q. You did not testify to that before.

A. No, sir.

(Testimony of W. D. Haines.)

Redirect Examination by Mr. ORLAND.

Q. About what time in the day was it that Plaintiffs' Exhibit "A" was signed in your hotel?

A. I think about one or one-thirty in the afternoon.

Q. How long after the instrument was signed in your office was it that Watson left town?

A. He left on the 3:15 train in the afternoon.

Q. And was not back there again that you know of for some time? A. No, sir.

Q. Was it two or three days after the signing of Exhibit "A" that he left town? A. No, sir.

(Witness excused.)

[Testimony of Henry Stroh, for Defendant.]

HENRY STROH, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BROWN.

Q. What is your name? A. Henry Stroh.

Q. And where do you reside, Mr. Stroh?

A. In Farmington.

Q. How long have you lived there?

A. Twenty-one years.

Q. What business do you follow?

A. I am a farmer, have been a farmer, and am farming now.

Q. In February 1911, did you have any negotiations or dealings with this man Watson in the house of A. C. Ruby, in regard to the stallion Ithos?

A. Yes, sir.

Q. How did you come to have that dealing with him? [77]

(Testimony of Henry Stroh.)

A. He stopped in Farmington about two weeks to sell that horse.

Q. Did you purchase any of the stock in that horse, of Mr. Watson?

A. No, sir, I got no stock. I bought an interest in him and Poindexter got one.

Q. How much of an interest did you have?

A. I got six shares and Poindexter one.

Q. What arrangements did you make as to paying for?

A. I paid \$2,400 and Poindexter \$400.00 and we made arrangements with him on a note.

Q. In these negotiations or dealings, did you sign any papers? A. Yes, sir.

Q. I now hand you Plaintiffs' Exhibit "A" and ask you to look it over and see if you signed it.

A. Sometime I made a cross. I signed that paper.

Q. Was it in the condition it is now?

A. I never signed a note. I signed a copy of contract.

Q. Was this matter your handwriting?

A. That is my name and I signed a contract and a copy of the contract.

Q. A contract to receive a horse? A. Yes, sir.

Q. And would that be those two papers you signed?

A. Yes, sir, I signed that paper. I got one home like that.

Q. That is all you signed?

A. I signed a contract and a copy of a contract.

Q. Was that note written out and filled up that way? A. I never signed a note.

(Testimony of Henry Stroh.)

Q. Where did you sign this paper?

A. Down in the hotel in the office. I signed them right there.

Q. Who was present?

A. I, Watson, the hotel man and Poindexter. That is all.

Q. The hotel man on the witness-stand just ahead of you? [78] A. Yes, sir.

Q. Was the horse delivered to you that day, you and Mr. Poindexter?

A. Yes, sir, about twelve o'clock.

Q. Did you have any talk with Watson after you left the hotel? A. Yes, sir, I told him—

Q. After,—Have you ever seen this paper?

A. He said, "I got no time; I got to go to Spokane," and I asked him if it was a note, and he said, "When I come from Spokane I fill that note out and I can swear to it all the time."

Q. Now, that was after you signed this paper?

A. My name is on.

Q. Who told you this?

A. Watson, I got—he told me when I signed the paper. We left right after that. We went to Spokane after I signed the note.

Q. How long did you keep the horse in Farmington?

A. I forget when. I keep him there to July 15 and take him to Portland.

Q. What was the condition of that horse?

A. Wind-broken and I could not travel the horse.

Q. Have you handled horses?

(Testimony of Henry Stroh.)

A. Yes, sir, lots of them.

Q. He is no sound horse, is he? A. No, sir.

Q. Did you take the horse back to Portland?

A. Yes, sir, on July 15th, and on the 17th I was in Portland with him.

Q. What did you do with him?

A. I take him down to the barn and notify the company, the Ruby Company.

Q. And what did they do? [79]

A. Watson and the company promised me to exchange the horse and I notify Watson by phone and he said in at eight o'clock, and Watson come in and said, "We go out and look the horses in the barn." He said, "We got some pretty horses."

Q. What did you do then?

A. We jump in an automobile and go out to the ranch.

Q. How far out did you go?

A. About ten miles

Q. And what did you do out there?

A. Looked at the horses.

Q. Did he have any horses?

A. He said they were pretty horses, but they were not for me.

Q. What do you mean—do you mean no horses for the price?

A. No, sir; he got some cripples and some spotted-cayuses out there,—about fifteen colors.

Q. And he wanted you to take one of these in lieu of the \$2,800.00 horse? A. Yes, sir.

Q. Did you take a horse? A. No, sir, I did not.

Q. What did you finally agree to do?

(Testimony of Henry Stroh.)

A. I go back to Portland and sue company for damages.

Q. What became of the horse?

A. I take four men out the next day to the barn and he got no horse for me at all.

Q. What do you mean?

A. He got two year old colts and old horse out there.

Q. Did you offer to give them the horse back?

A. Yes, sir, and take another horse and pay me and go home.

Q. What did you say to Watson in regard to taking the horse back?

A. I say, "I take the horse in your possession and when the company comes in new horses, he notify me and I take another [80] horse," and I put the money in the bank for your horse. He says, "No, you leave the horse in the livery-barn and Ruby says he pay the feed bill."

Q. Did they notify you to come down to Portland and see about it? A. Yes, sir, I go down.

Q. How many times did you go down there?

A. Four times. Watson notified me two and said Ruby got in horses and I go down and he no got the horses. No, sir.

Q. Was Mr. Ruby there?

A. One fellow of the company come in and taken me out to the barn.

Q. But you did not see Mr. Ruby?

A. No, sir, I am a stranger, do not know nobody.

(Testimony of Henry Stroh.)

Q. You offered to put the money in the bank for a horse?

A. Yes, sir; I show Watson a draft for \$2,800.00, all ready, right in front of his mouth.

Q. You offered him that if he would get you a horse such as you bought and take the one you had back?

A. Yes, sir, I offered it to him right in front of his mouth like that.

Q. And he did not do it?

A. No, sir, he did not want to do it.

Q. How many trips did you make to Portland for the purpose of getting another horse in the place of the one you took down there?

A. I make three trips before and I took a trip with Poindexter down there.

Cross-examination.

(By Mr. NEAL.)

Q. Mr. Stroh, you say you signed this contract, Plaintiffs' Exhibit "A"?

A. Yes, sir, that is my name and I can show you a name in my pocket the same way.

Q. You also signed Plaintiffs' Exhibit "G"?
[81]

A. Yes, sir, that is the guaranty. I know the paper but I cannot read English.

Q. You claim you got that? A. Sure.

Q. When did you first learn that this paper was a note?

A. I never signed a note, but I signed a contract and a copy.

(Testimony of Henry Stroh.)

Q. You are positive you never signed a note?

A. I not signed a note. I signed a contract and a copy of a contract.

Q. You want to tell the jury you never signed a note?

A. No, sir; I asked Watson outside on the porch if it was a note when he was going to Spokane, and he said it was a contract and I signed it.

Q. Did you sign a receipt for the horse when the horse was turned over to you by Mr. Watson?

A. No, sir, he never got my receipt as I know.

Q. Is that your signature on Exhibit "F"?

A. Yes, sir, right there.

Q. You signed that?

A. Yes, sir, he bring a whole handful of papers.

Q. Did you sign that?

A. I know I signed two papers.

Q. Did you sign that? A. Yes, sir.

Q. When did Mr. Watson turn the horse over to you?

A. The same day I bought the horse, but I cannot say the date.

Q. And did Mr. Watson leave Farmington the same day? A. Yes, sir.

Q. He left the same day on the afternoon train?

A. Yes, sir, and he was in a hurry to get away.

Q. Did you see Watson around the hotel after that when or while you were staying at the hotel?

A. No, sir, I never been in the hotel, put up at the hotel for [82] twenty-one years, and I can prove it.

(Testimony of Henry Stroh.)

Q. Do you know the man Kerston who signed the paper as a witness?

A. I do not know him but his name is plain on the paper.

Q. You know this man here, Mr. Kerston, do you not? A. Yes, sir.

Q. You came up to the hotel with him when you signed this paper, did you not? A. No, sir.

Q. Mr. Kerston was down to your place, was he not? A. No, sir.

Q. And he came up to the hotel with you?

A. No, sir.

Q. On the same day you received the horse and signed the receipt?

A. No, sir, I never signed that in the hotel.

Q. You think that Kerston witnessed your signature without seeing it written, do you?

A. Kerston never signed that paper before my eyes.

Q. He did not do that? A. No, sir.

Q. When you signed this Exhibit "A" was Poindexter's signature on it?

A. He signed it already, yes.

Q. And Mr. Poindexter had already signed this Exhibit "G" when you signed it?

A. Yes, sir, he signed every time first, the contract and the copy before I signed.

Q. Now, Mr. Stroh, you kept the horse there and stood him during the season in July and then you went down to Portland and took the horse with you?

A. Yes, sir. [83]

(Testimony of Henry Stroh.)

Q. And you called up Watson and told him that you were there with the horse? A. Yes, sir.

Q. And Watson told you to come out to the farm and pick out another stallion? A. Yes, sir.

Q. And you could not find any to suit you?

A. He did not have any good ones.

Q. And so you refused to take one?

A. Yes, sir, I had four men go out with me to look and they did not see any.

Q. And Mr. Watson told you that they would have another shipment in soon and you could have your pick out of that? A. Yes, sir, he told me that.

Q. And later you come back to Portland and made an appointment to meet Mr. Ruby in the hotel?

A. I made an appointment, yes.

Q. And you refused to keep the appointment to meet A. C. Ruby, did you not?

A. Well, I do not know.

Q. You were not there when Mr. Ruby went there at the time you said you would be there?

A. He notified me he would be there.

Q. He notified you that he would meet you at a certain time and place and you were not there. I am trying to find out what Mr. Ruby did. You say you made an appointment to meet Mr. Ruby in Portland in one of the hotels and when Mr. Ruby arrived you were not there, were you? Is that a fact?

A. If Mr. Ruby waited for me at hotel I never knew that.

Q. Did you not just say you had an appointment to meet Mr. Ruby at a hotel? A. I did.

(Testimony of Henry Stroh.)

Q. As a matter of fact, you have refused to take a stallion in [84] the place of the one you had?

A. Yes, sir.

Q. In other words, you wanted to take one three times as valuable as the one you had?

A. You think I wanted to take an old cripple worth nothing?

Q. You know, as a matter of fact, that Watson showed you some first-class horses and told you to take your pick?

A. I took four men out there to see the horses and they were worthless; all that was out there wasn't worth nothing.

Q. And you know, as a matter of fact, that two of those horses took prizes at the Walla Walla fair?

A. I do not know he got a horse at Walla Walla. I like to know what horse he got.

Q. He took them, two of them he showed you, on the first trip to Walla Walla. A. Yes, sir.

Q. Now, I will ask you if, as a matter of fact, that two of the horses took prizes at Walla Walla. The Percheron horses you looked at when you were down to Portland the first time.

A. He got a little gray horse, two years old, and I did not take that because he got five or six colors on him.

Q. In other words, you went down to Portland in July when Mr. Ruby had six or eight or ten horses and none of them satisfied you? A. No, sir.

Q. And you took four men down when he got the

(Testimony of Henry Stroh.)

shipment down there of thirty-seven and you could not find a stallion that was satisfactory to you?

A. I got four men out there to look at them for me.

Q. The second time you did not take any one out when you went? A. No, sir.

Q. When was the second time after the shipment of 37 head come in. You did not even go out to the farm to look at the 37, did you? [85]

A. He got no horses down when I was there the second time.

Q. How do you know? A. I found out.

Q. How did you find out?

A. I asked a man down there and he said they not got any in.

Q. When you were there the third time did he have any in? A. No, sir.

Q. When did you go down the third time?

A. I do not know when.

Q. When did you go down the second time?

A. About a month after the first time.

Q. Was it in August?

A. I do not know what time.

Q. Was you down there in September?

A. I believe so.

Q. When did you go down the third time?

A. I do not remember the date, and I cannot read or write English.

Q. You went down there Mr. Stroh prior to the 25th of September, did you not?

A. I was down there in July and—

Q. Then you come home? A. Yes, sir.

(Testimony of Henry Stroh.)

Q. And then you went down again prior to September 25th, 1911?

A. Yes, sir, he notified me and I come down.

Q. Did Mr. Ruby notify you, after you *had down* there and come home the second time, he wrote you a letter? A. He did, yes.

Q. I show you a letter dated September 25th, 1911, and ask you if that is the letter you received from Mr. Ruby.

A. I wrote him fifty letters to change the horse.

Q. Is that the one you received Mr. Ruby? [86]

A. I could not say, but I received several letters.

Q. I will read the letter to the witness, as he stated he could not read or write English.

Q. Mr. Stroh, how did you manage to read the letters when you received them?

A. I go see somebody to read it.

Q. Did Mr. Ruby ever write you after this time that he was disappointed when you did not keep the appointment made with him?

A. Yes, sir, and he said if I keep the horse one year he would get over the spell.

Q. You say you got a letter with that in?

A. Yes, sir.

Q. Was that along about September?

A. That was the 15th when I wrote the letter to him and I told him he got to come and make that right.

Q. And Mr. Ruby told you that he did not think you had tried to do what was right in the matter?

A. Yes.

(Testimony of Henry Stroh.)

By Mr. NEAL.—I want to get him to identify this letter and he cannot read.

By the COURT.—Let me see the letter and I will permit you to read it to him if material. You may read it to him.

(Letter read to witness.)

Q. Did you receive that letter?

A. No, God bless me, no.

Q. You never received that letter?

A. No. How did you get that letter?

Q. You are sure you never received it, are you?

A. No, sir, not that letter. How did you get that letter? [87] I would like to know that.

Q. I mean, did you receive the letter of which this is a copy, Mr. Stroh?

By the COURT.—Counsel wants to know whether you ever got a letter from Mr. Ruby that read like this one reads.

A. No, sir, Judge, no.

Q. Now, you had an attorney, Mr. T. J. Lutey, once in this matter?

A. What do you mean? Yes, sir.

Q. And when you received the letter which I read to you dated September 25, 1911, you took it over to Mr. Lutey, did you not?

A. He get the letter. I did not get the letter.

Q. I will ask you if you did not deliver a copy of that letter to Mr. Lutey at Farmington, Washington.

A. Yes, sir, I turned over lots of letters to him.

Q. I am asking you if you did not receive a letter of which that is a copy, and if you did not take that

(Testimony of Henry Stroh.)

letter and deliver it to your attorney, T. J. Lutey, at Farmington, Washington.

A. I never heard of a letter like that. I never wrote a letter like that.

Q. Did you not go to see your attorney, T. J. Lutey, on October 7th, 1911 with reference to this matter?

A. I forgot what day. I see him lots of times.

Q. And at that time after September 25, 1911, and up to the 7th of October, did you go to your attorney, T. J. Lutey, and have him answer this letter for you, or the original of which this is a copy? Did you do that?

A. Yes, sir, I go to see him often.

Q. Now, calling your attention to Plaintiffs' Exhibit "B-2" for identification, I will ask you if after the date of this letter, and prior to the 7th of October, or prior to the 8th [88] of October, you did not go to your attorney, T. J. Lutey, at Farmington, with the original of this letter and submit it to your attorney and have him write back in reference to it.

A. Yes, sir, I told him to write to him all the time. I wanted a settlement out of him.

Q. What did you tell him to write about?

A. I told him to write to Ruby if he got a Percheron horse I go and get him.

A. Did you see the letter your attorney wrote?

A. Yes, sir, he read it to me.

Q. Assuming that the letter is dated,—do you know Mr. Lutey's signature?

A. No, sir, all I know was he wrote for the horse, for a settlement.

(Testimony of Henry Stroh.)

Q. I will read this letter——

(Letter marked Plaintiff's Exhibit "B-2" for identification read to witness.)

Q. Is that the letter that Mr. Lutey read to you?

A. Yes, sir, but that is not the letter that Ruby wrote to me.

Q. This is the letter that referred to it. Do you distinguish between the copy and the original?

A. I never got a letter to that effect.

By Mr. NEAL.—I desire to offer the two letters in evidence.

By Mr. BROWN.—I object for the reason that they are immaterial and self-serving.

By Mr. NEAL.—The first one, Plaintiff's Exhibit "B-2," I desire to offer for the purpose of showing that Stroh was offered a horse in exchange; and I offer the other letter for the purpose of showing that Mr. Stroh did receive this letter. [89]

By Mr. BROWN.—I object to the letter purported to be to Mr. Stroh on the ground that it is self-serving, incompetent and immaterial and not proper cross-examination; and the other one as not being identified, incompetent and immaterial.

Objection sustained.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

Q. You said you believed you never signed any note?

A. I signed a contract and a copy of a contract.

Q. Now, you commenced suit in the Circuit Court

(Testimony of Henry Stroh.)

of the State of Oregon, in which you were the plaintiff and H. S. Deardoff, S. K. Watson and Thos. S. Poindexter were defendants, did you not?

A. Yes, sir, I sued Ruby all right for that horse.

Q. And on July 29, 1911, you swore to this complaint as being true before Mr. Renfrew, a notary public at Farmington?

A. I did not know I swear to anything.

Q. The complaint filed in Portland was sent to you for your signature?

A. I never swore in Farmington.

Q. You filed suit in July 1911?

A. Yes, sir.

Q. And at that time you knew you signed a note?

A. No, sir, I signed a contract and a copy.

Q. And your knowledge in reference to you signing a note now is not any better than it was when you signed this complaint. I will withdraw that. Now, when was it you found out the horse was badly wind broken?

A. The next day after I got him. I led him home.

Q. What did you mean in your complaint when you sued A. C. Ruby for damages—I read you this portion of the complaint: “That in truth and in fact the horse was in bad condition for [90] breeding purposes, all of which was unknown to the plaintiff until long after said sale.” How do you reconcile that statement with the testimony just given by you.

A. I led him home the next day after I bought him and he could not go without breathing hard.

Q. How did it come that you made that statement?

(Testimony of Henry Stroh.)

A. I found it out the next day and notified the company the next day.

Q. Then this statement is untrue?

A. No, sir, I found it out the next day.

Q. At the time you filed this complaint,—have you seen this paper since signing it, Exhibit “A”?

A. I never saw it until I came here.

Q. You never saw it until it was shown to you here?

A. No, sir.

Q. Why was it you stated in this complaint that you gave a note for \$2,400.00?

A. I never sued for the note. I sued for the horse.

Q. You sued to cancel the note?

A. No, sir, I sued Ruby against the horse.

By Mr. NEAL.—If the Court please, I desire at this time to offer in evidence a certified copy of the complaint in the case of Henry Stroh versus Thos. S. Poindexter, H. S. Deardorff and A. C. Ruby, in the Circuit Court of the State of Oregon, which is duly certified to by the County Clerk of Multnomah County attached; and I desire to offer that in evidence for the purpose of contradicting the statement of that witness that he never at any time signed a note, and for the purpose of contradicting the witness wherein he stated as to the condition of the horse that he did not discover it until a certain date, and also for the purpose of showing that the [91] witness Stroh knew and considered that this was a negotiable note, and for any other purpose that the instrument might be competent for.

(Testimony of Henry Stroh.)

By Mr. BROWN.—I object to its introduction in evidence upon ground that it is incompetent and immaterial and not proper cross-examination and is not contradictory of the testimony of the witness on the stand, and is not competent by this to show that this defendant knew that this note was negotiable, because he is not a party to this action and it would not be binding upon this defendant Poindexter so far as the note being negotiable or non-negotiable.

By the COURT.—In what respect is it incompetent?

By Mr. BROWN.—To show by this declaration made in the complaint there in Portland that he knew this note was negotiable because he is not a party to this action.

By the COURT.—The first objection will be sustained.

By Mr. BROWN.—Taking the instrument as a whole, it is not contradictory in that, and if he is mistaken in that, as he cannot read, that would not be contradictory as to his testimony here, as he did not know what the attorneys alleged.

By Mr. NEAL.—He was seeking to get \$2,400.00 in damages on account of keeping this horse, arising out of this transaction and stated in there that he gave his note for \$2,400.00.

By the COURT.—I think it will be received as to the testimony on those two points: When he discovered that it was a wind-broken horse, and, when he sued, that it was a note he signed. [92]

By Mr. NEAL.—And further, that he knew of a

(Testimony of Henry Stroh.)

copy of this guaranty being set out in the complaint.

By the COURT.—I think he already has admitted that he received the guaranty.

Q. Mr. Stroh, you did not see Mr. Watson only on two occasions in Portland,—when you were in Portland, how many times did you see Watson on those trips?

A. Each time I was down there.

Q. Did you talk with him each time?

A. Yes, sir, right on the square.

Redirect Examination by Mr. BROWN.

Q. Did you stand that horse during the year 1911?

A. Yes, sir.

Q. How many mares did he serve?

A. Thirty-eight mares.

Q. And how many colts did he get?

By Mr. NEAL.—Object to the question upon the ground that it is incompetent, irrelevant and immaterial, for the reason that the guaranty is in evidence, and the only liability of Ruby & Company is to give another horse.

By the COURT.—Objection overruled.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

A. He got five live colts and two dead.

(Witness excused.)

[Testimony of G. B. Whitney, for Defendant.]

G. B. WHITNEY, being first duly sworn as a witness on behalf of the defendant, testified as follows: [93]

Direct Examination by Mr. ORLAND.

Q. Give your full name.

A. G. B. Whitney.

Q. And where do you reside?

A. I farm west of Palouse about four miles.

Q. How long have you resided there?

A. Very nearly thirty-one years.

Q. What business are you engaged in?

A. Farming and stock-raising.

Q. Have you handled stallions as a business to some extent?

A. I have been until this year.

Q. Do you know A. C. Ruby?

A. Yes, sir.

Q. Where did you meet him?

A. In Portland.

Q. Have you ever been engaged with Ruby in assisting in selling horses?

A. Yes, sir.

Q. Have you had any conversation with Mr. Ruby with reference to the method of taking papers from persons to whom horses were sold?

A. Yes, sir.

Q. Where was it this conversation took place?

A. At Portland with Mr. Ruby.

Q. And when did it take place?

(Testimony of G. B. Whitney.)

A. That was somewheres about two months from the time these fellows bought the horse.

Q. Before or after that time?

A. Before they bought the horse.

Q. And that conversation was in pursuance of—in this conversation had with Mr. Ruby, was it had in pursuance of employment with him for the sale of horses? A. Yes, sir. [94]

Q. What did he tell you was the method of obtaining paper for the sale of horses? Did he inform you what the general method was of obtaining notes for horses sold to farmers? A. Yes, sir.

Q. You may state what Mr. Ruby told you.

By Mr. NEAL.—I object on the same ground, and for the reason it is not shown it has any reference whatever to the transaction in this case.

By the COURT.—You say, Witness, that Mr. Ruby told you how his agents generally procured notes, under what general conditions; or was it merely telling you what you would do?

A. No, sir, he gave me instructions just as other agents; and I saw the papers that Watson got.

By the COURT.—He simply told you as to what you should do.

A. He gave me general instructions.

By the COURT.—He said nothing about what the other agents do.

A. He said it was the same proposition. My instructions, he just instructed me the same as his other agents.

Q. Did he tell you what he instructed his agents to do?

(Testimony of G. B. Whitney.)

By Mr. NEAL.—I object to the question as leading.

By the COURT.—You ought to understand the question. I asked you whether he told you what you should do, or what the others did.

A. He told me what I should do and he said that was the way the others did.

By the COURT.—I doubt very much, gentlemen, whether this testimony is admissible. The witness does not understand what is wanted of him. [95]

A. He explained the way to me, and he told me the methods of doing business and he told me how to sell the horses and take joint notes.

By the COURT.—And that is all he said?

A. Yes, sir.

Q. Do you know Mr. Watson?

A. Yes, sir.

Q. Do you know the horse Ithos? A. Yes, sir.

Q. Where did you see him?

A. In Portland, in Ruby's barn.

Q. And where else did you see him?

A. The next time I saw him was in the livery-stable in Garfield.

Q. Do you know what the condition of the horse was at that time?

A. Yes, sir, to a certain extent.

Q. What was the condition of the horse?

By Mr. NEAL.—We object, for the reason that it is incompetent and not admissible, it appearing from the evidence in this case that there was a written guaranty given with the horse, and that the only lia-

(Testimony of G. B. Whitney.)

bility incurred by Ruby & Company, in case the horse was not up to the guaranty, was to give another horse in its place and the evidence shows that Ruby was willing to do so at all times and therefore this evidence is immaterial.

By the COURT.—In the light the record now stands, assuming it to be true that the written guaranty was given, it would be incumbent for the defendants to show that the horse failed to comply with the written guaranty.

By Mr. NEAL.—I do not see the materiality when the evidence shows we offered to give them another horse. [96]

By the COURT.—Mr. Stroh's testimony, if true, is to the effect that you were unwilling to make the exchange.

By Mr. NEAL.—I do not see that it should be submitted to the jury when Mr. Poindexter's testimony shows that Mr. Ruby was always willing to give them another horse. Mr. Stroh's testimony shows that he only made one trip to the barn to select another horse and that he never went down to the farm after the shipment of 37 head was received and after he had been notified to come down and take his pick.

By the COURT.—The objection will be overruled.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

A. The horse was badly wind-broken.

Q. What experience have you had in the handling of stallions?

(Testimony of G. B. Whitney.)

A. I have handled them pretty near steady since I was sixteen years old.

Q. And how many stallions have you handled in that time?

A. I suppose fifteen or twenty.

Q. Were you engaged in the breeding of stallions during that time?

A. Yes, sir, to a great extent.

Q. You say that you know Mr. Watson?

A. Yes, sir.

Q. How long have you known him?

A. I have been personally acquainted with Watson ever since I was at Portland.

Q. Now, did you see Watson when he was at Garfield and Farmington along about February, 1912?

A. I saw him when he was in Garfield, but not in Farmington.

Q. Did you have any conversation with him with reference to this stallion Ithos after he was sold to Poindexter and Stroh? [97] A. Yes, sir.

Q. State what that conversation was.

By Mr. NEAL.—I object on the ground that it is incompetent, irrelevant and immaterial.

By the COURT.—Objection overruled.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed. I sustained the former objection because it is not shown that the witness had any knowledge as to the effect of breeding defective stallions, as to wind-broken stallions.

By Mr. ORLAND.—I apprehend that the effect of

(Testimony of G. B. Whitney.)

breeding a stallion which is defective would be general.

Q. Just state the conversation you had with Mr. Watson.

A. He told me that he had got rid of the bay horse and said that he had an idea that the horse would beat him back to Portland when the Dutchman finds out what is wrong with him; and he also said that when Ruby put him out that he did not care to have him taken across the Idaho State line because the State would prosecute him, but he could sell it to Idaho fellows. He stated to me that the horse was wind-broken and had no value about him.

Q. Do you *what* the effect of breeding of a wind-broken stallion has upon the colts that he gets?

A. Yes, sir.

Q. Now, you may state what the effect of breeding a wind-broken stallion is with regard to the colts he gets.

Cross-examination by Mr. NEAL.

Q. Did you ever stand any stallion that was wind-broken?

A. I bred to one with a bunch of good strong mares. [98]

Q. Where was that?

A. Close to Palouse City.

Q. Who owned the stallion?

A. My father.

Q. And when was that?

A. Three or four years ago.

Q. Where did you get the stallion?

(Testimony of G. B. Whitney.)

A. Raised it.

Q. Did you get any colts?

A. Yes, sir.

Q. And what was the matter with them?

A. They were thick-winded.

Q. Was that the fault of the stallion?

A. Yes, sir.

Q. How about the mares' condition?

A. They were as sound as a dollar.

Redirect Examination.

Q. And what is the effect of breeding to wind-broken stallions, with reference to their get?

A. A good many of the colts will be thick-winded and when you work them they are no good.

Recross-examination by Mr. NEAL.

Q. You had some trouble with Mr. Ruby, did you not? A. No, sir, not me.

Q. What was that?

A. No, sir, not me. The company I was in had some trouble with him.

Q. He had trouble with you, did he not?

A. No, sir, none whatever.

Q. Did you go out and sell any horses for him?

A. No, sir.

Q. You said you worked for him, did you not?

A. No, sir, he was bargaining for me to go to work. [99]

Q. You tried to get a position selling horses?

A. No, sir, but he wanted me to sell for him. He wanted me to take three horses back with me.

Q. Tell the jury what was the occasion that Mr.

(Testimony of G. B. Whitney.)

Ruby was giving you so many instructions about his business.

By the COURT.—That was ruled out.

Q. You say you had a conversation with Mr. Watson after he had sold this horse? A. Yes, sir.

Q. When was that?

A. I think that was in Palouse.

Q. Do you know when it was?

A. I think—I talked with Mr. Watson at Garfield and Palouse.

Q. When was it you had the conversation you had testified about here?

A. In Palouse, I think

Q. When was that?

A. Not longer than four or five days after.

Q. When was it?

A. In the winter-time.

Q. When, with reference to this sale?

A. I think it was four or five days after the sale. It was right close after the sale. I never kept no track of the dates.

Q. Now, you say that Mr. Watson told you he expected that the horse would be back to Portland before he got there? A. Yes, sir.

Q. And he told you that at Palouse?

A. At Palouse or Garfield.

Q. And that was four or five days after the sale?

A. It was within two weeks of that time. It was right along there. [100]

Q. Are you sure it was within six months of the time? A. Yes, sir.

(Testimony of G. B. Whitney.)

Q. You say you have handled fifteen or twenty stallions? A. Yes, sir.

Q. Where did you handle all of those?

A. In Willamette, Dayton and Walla Walla.

Q. What was the name of the first one?

A. His name was Jolly.

Q. And where was that you handled him?

A. My father had him at Palouse.

Q. And when did you handle him?

A. When I was a kid I bred him.

Q. How old were you?

A. From twelve to fourteen years old.

Q. You commenced breeding stallions when you were fourteen years old?

A. Yes, sir, around there.

Q. And what was the next stallion you handled?

A. A stallion by the name of Sam. That was Stephens' horse.

Q. And where does Stephens live?

A. In Palouse.

Q. Did Mr. Stephens employ you to breed him?

A. No, sir, my father brought him to the place to breed.

Q. You did not breed him then?

A. Yes, sir, I did.

Q. Is that all you remember—just the two?

A. I think Severs owned the next one. No, sir, between Dayton and Walla Walla was the next one.

Q. And what stallion was that?

A. He belonged to a farmer by the name of Andrew Evans.

(Testimony of G. B. Whitney.)

Q. Was you employed to stand that stallion?

A. I worked him and bred him.

Q. Was he registered? [101]

A. Yes, sir, I think so, and he was seventeen or eighteen hands high.

Q. That is three. What is the next one you were breeding?

A. Some horse around the place there, a young horse; and the next one was when I commenced paying more attention to horses, Mr. Severs owned it.

Q. What was the name of that horse?

A. His name was Capt.

Q. Was he supposed to be registered?

A. Yes, sir.

Q. And imported? A. No, sir.

Q. Did you stand that horse?

A. I kept the horse and bred him for two months.

Q. How many horses did you breed him to?

A. To six or seven of our own and some outsiders.

Q. And what was the next stallion you stood?

A. I do not remember. At that time we had several horses around there.

Q. I do not want to know what we did, but what you did. A. We were all together on the ranch.

Q. You testified that you had a great deal of experience. Now, what is the next one?

A. When I started to do a big business with stallions, Colonel was the next one.

Q. And where did you stand him?

A. At Palouse.

Q. Did your father own the horse and raise him?

(Testimony of G. B. Whitney.)

A. Yes, sir.

Q. What was the other horses you and your brother stood?

A. The next one we had was by the name of Eagle Bird.

Q. You owned that horse?

A. I and my brother. [102]

Q. When was that?

A. I do not remember, but we owned three of them together, and then I owned a horse all alone at the last.

Q. About when was that?

A. I do not remember, but it was the fifth or sixth or seventh horse.

Q. Just name the other stallions.

A. There was a sorrel horse that I was taking care of for Ruby.

Q. When was that? A. About two years ago.

Q. Did you say you took care of him for Ruby?

A. No, sir, it was a Ruby horse.

Q. Can you name any other stallion?

A. I took care of and bred a horse for Mr. Elden.

Q. Do you mean that you bred him to your own mares? A. Yes, sir, and a few outside mares.

Q. Did you,—who stood the horse generally?

A. The fellow's name was Mack.

Q. Did you have entire charge of the horse?

A. They left the horse there at times for breeding and I took care of him for four years.

Q. All of those left there were for to breed your own mares and then they took them away?

(Testimony of G. B. Whitney.)

A. That is all, mostly, but I have taken care of young stallions every year.

Q. Most of the stallions were ordinary common horses? A. Yes, sir.

Q. You know, as a matter of fact, from long experience that the ordinary horse is liable to produce very inferior colts, do you not? A. No, sir.

Q. You do not know that? A. No, sir.

(Witness excused.) [103]

[Testimony of S. L. Stewart, for Defendant.]

Mr. S. L. STEWART, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. ORLAND.

Q. You may state your full name.

A. S. L. Stewart.

Q. Where do you reside?

A. Farmington, Washington.

Q. How long have you resided there?

A. In town about twelve years.

Q. Are you acquainted with Mr. Poindexter?

A. Yes, sir.

Q. Where were you in the month of February, 1911.

A. In Farmington, Washington.

Q. What business were you engaged in that time?

A. At that time I was not engaged in any business.

Q. Do you know anything about a horse or stallion being brought there by Mr. Watson?

A. Yes, sir.

(Testimony of S. L. Stewart.)

Q. Are you acquainted with that stallion?

A. Yes, sir.

Q. Were you there at the stables a considerable time during the time the horse was there?

A. Yes, sir.

Q. What were you doing?

A. The stable is right between my house and the business part of town, and I had to pass there often.

Q. You did not have a stallion there at that time?

A. No, sir.

Q. Did you have occasion to examine the Watson stallion? A. No, sir.

Q. Did you see the horse?

A. Yes, sir; several times.

Q. Do you know what the condition of that horse was along [104] about that time and later?

A. Yes, sir.

Q. State what that condition was.

By Mr. NEAL.—I object to that on the same ground as the other.

By the COURT.—Overruled.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed.

A. When I first saw him, he seemed to have a cold or thick wind or something of that sort; at any rate, I would not pronounce his wind sound as he was breathing heavily and loud.

Q. Did you see him later?

A. In April, about the last, I took a stallion to stand there in town, and Mr. Stroth stood in the next

(Testimony of S. L. Stewart.)

stall, and from that on I was with the horse most every day.

Q. What was the condition of the horse at that time?

A. I thought he was badly wind-broken. I saw Stroh exercising him there.

Q. What condition was he in with reference to serving mares, as to his physical condition and ability?

A. I did not think it was good at all.

Q. In what respect was it not good?

Q. You may state if you are accustomed to handling stallions.

A. Yes, sir; I have had a good deal of experience.

Q. How long—how many years?

A. I guess it is thirty years since I first commenced to handle them, and I have handled them off and on most of the time since.

Q. How many stallions have you handled?

A. I could not say. [105]

Q. Are you handling them now?

A. Yes, sir; I have handled one horse for six seasons.

Q. You may state the ability of this horse to serve mares.

A. He was badly wind-broken and hardly fit to exercise. He could not get his breath, and would almost choke down at times.

Q. How about moving him from one place to another?

A. I never moved him, but I would not like to do it.

(Testimony of S. L. Stewart.)

He was not able to go from one place to another and do the horse justice.

Cross-examination.

(By Mr. NEAL.)

Q. Did he act like a horse that might have had the distemper? A. Yes, sir; he did.

Q. You say there was something the matter with his breathing? A. Yes, sir.

(Witness excused.)

[Testimony of A. R. Knight, for Defendant.]

A. R. KNIGHT, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. ORLAND.

Q. You may state your name.

A. My name is A. R. Knight.

Q. And where do you reside, Mr. Knight?

A. At Farmington, Washington.

Q. How long have you lived there?

A. For the past seventeen years.

Q. Are you acquainted with Mr. Poindexter?

A. Yes, sir.

Q. Do you know Mr. Watson? A. Yes, sir.

Q. Where were you during the winter and early spring of [106] the year 1911?

A. I was on a farm close to Farmington, about three miles east of Farmington.

Q. Are you a farmer? A. Yes, sir.

Q. Are you accustomed to handling stallions?

A. Yes, sir.

Q. How many years' experience have you?

(Testimony of A. R. Knight.)

A. Since I was ten years old. My father was a big stockman when I was a kid.

Q. And you have been engaged more or less in handling them ever since?

A. Yes, sir; up until the last few years.

Q. Do you know the stallion Ithos, the horse sold by Mr. Watson and the Ruby Company to Mr. Stroh?

A. Yes, sir.

Q. Where did you see him?

A. I saw him in the livery-barn in Farmington.

Q. And have you seen the horse since that time?

A. Yes, sir; I bred some mares to the horse.

Q. State what his physical condition was, with reference to breeding mares.

By Mr. NEAL.—I object for the reason that there was a written guaranty delivered with the horse and Ruby has at all times been willing to exchange the horse; and for the further reason that the witness is not qualified to testify.

By the COURT.—Overruled.

To which ruling of the court plaintiffs then and there excepted, and which exception was duly allowed.

Q. State what his physical condition was. [107]

A. He was thick-winded or broken-winded. I know he could not breed good.

Q. Did you ever see the horse moved?

A. Yes, sir; he brought it out to my place.

Q. What was the condition of the horse at that time?

A. He was pretty near down and out when he got there.

(Testimony of A. R. Knight.)

Q. And how far from town was that?

A. About three miles.

Q. How many mares did you breed to the horse?

A. I bred two mares.

Q. Did you get any colts? A. No, sir.

Cross-examination.

Q. Have you bred those mares since then?

A. Yes, sir.

Q. How many times was the mares returned to the horse during the season?

A. I could not say, but I bred them. The season started in the spring.

Q. You do not know how many times?

A. No, sir.

Q. You are in a partnership with Mr. Poindexter, are you not?

A. Yes, sir; in a threshing-machine.

Q. And have been for a number of years?

A. Yes, sir.

Q. Did Mr. Poindexter try to get you to buy a share in this horse?

A. He asked me if I did not want to buy a share, and he showed me the horse.

Q. When was that?

A. Directly after the horse was brought to Farmington, but I do not remember the dates. [108]

Q. Mr. Knight, do you remember being down to the washroom of the Moscow Hotel on Wednesday afternoon, or in the evening, I think it was, of this week, engaged in a conversation with Mr. Kerstone?

A. Yes, sir; I remember being down there.

(Testimony of A. R. Knight.)

Q. You remember that, do you?

Q. You remember of having a conversation with him, do you? A. No, sir; I did not.

Q. Do you remember standing just to the right of the doorway, in the corners, the two of you, talking? A. Really, I do not.

Q. You do not remember that?

A. No, sir; I said I did not.

Q. You remember talking to him about having received some \$25.00 for something?

A. Not in there.

Q. You did not say anything to him about that?

A. No, sir.

(Witness excused.)

By Mr. ORLAND.—This is our case.

Plaintiffs' Rebuttal Evidence.

**[Testimony of S. K. Watson, for Plaintiffs
(Recalled).]**

S. K. WATSON, being recalled as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. NEAL.

Q. You heard the testimony of Mr. Poindexter and Mr. Stroh? A. Yes, sir.

Q. In reference to signing of Plaintiffs' Exhibits "A" and "G," I wish you would just tell the jury how the circumstances of your sale of the stallion to Poindexter and Stroh came about.

A. In February, 1911, I moved this horse first to Garfield [109] from Portland, and *I taken* him from Garfield over the wagon road to Farmington;

(Testimony of S. K. Watson.)

and, as near as I recollect, the horse was landed in Farmington on February 5th; and, if I remember right, I arrived that day or the next day, I am not positive, but I think I got there the same night that the horse did,—and I stopped at the Hotel Farmington with Mr. Haines, and was there some little time. I went there for the purpose of organizing a company and selling this horse to a number of the farmers and horsemen of that country. After I was there, I do not remember how long, but I presume a day or such a matter, I was talking with Mr. Haines in regard to the farmers around that country and if he knew anyone interested in breeding better horses and had taken an interest along that line, and he talked awhile and said that Poindexter was a man who had good horses and mares and had been breeding to improve his stock, and that Poindexter would be a desirable man to get acquainted with along that line, and I was there, I think, a day or two before I met Mr. Poindexter, and, if I remember right, he brought his children in to school and came to the hotel and Haines introduced me to Poindexter, and Mr. Haines remarked in the conversation that I had a fine horse there for sale, and I began talking to Mr. Poindexter in regard to the stallion. He asked me what breed it was, and I told him it was a Percheron, and he said that he was not interested in buying a horse himself, but would like to see a horse like that in the country. We talked awhile, and, if I remember right, he went down to the barn with me, and the snow was about a foot deep, and I showed the horse out in front of the

(Testimony of S. K. Watson.)

livery-stable and Mr. Sullivan was there, and I am not sure, but I think, Mr. Knight was there at the time, but I am not positive, although I [110] think it was the first day that Poindexter saw the stallion, he said he was not interested in buying a horse himself; that they had a Shire there before and that for five years he had got some good colts, but that he was a Shire man; he was a Percheron man and not a Shire. And he went home, and I do not just remember whether he came back the next day or not, but I know that I saw him before very long after that and he came back and we talked about the horse again, the second time, and I insisted on him helping me to sell the horse, and he said he did not know whether he could or not, and we talked along for awhile, and, if I remember right, I did not put up the proposition in regard to terms of selling the horse until the next day, or the next time I saw Poindexter, but either then or later I told him what I wanted to do. I told him I wanted \$2,800.00 for the horse, and wanted to get seven men in it at \$400 a share and he asked me the terms and in regard to the guaranty, and I told him, and if this was the date I made the proposition, I would give him \$400 in it. I says, "I will tell you what I will do. You are acquainted with the farmers, and if you select six other men to buy a share in the horse, I will give you one share," and he asked me in regard to the note, and I told him it was a joint note, and he did not object to it, and he went away and told me that he would come back the next day, and I says, "If you will take up this proposition, we will

(Testimony of S. K. Watson.)

see what we can do," and I think it was, perhaps, the next day that he came in and I fixed up the note, the guaranty, and I made out a certificate of stock for \$400.00 and when I presented the \$2,800.00 note for him to sign, he took it up in his hands and started to sign the note, and he kind of laughed and says, "If I sign this note, *Wilson*, you can get on the train and hold me for the [111] whole thing," and I told him, "I would give him a bill of sale, and if this sale goes through, I will give you \$400.00 on the note and give you a share of stock." I explained to him that the \$400.00 would be endorsed on the note if the deal goes through and he says, "I guess I would not take any chance, and I agreed to give him back the note and told him that if I did not get up the stock that I would give him the note back, and at that time I never knew the name of such a person as *Stroh*. This was on February 14th, and I do not think I met *Stroh* until the morning of the 16th of February, and he was working, if I remember right, in the house across from the barn. When I met him he told me he had seen the horse on several occasions, and that he had just sold his property at *Winona* and would not mind having a horse himself, as he preferred that kind of a horse, and he asked me, "If I buy this horse or stock, will you take a note and farm mortgage?" and I stood and talked to him, and he told me that if I would give him the difference between the price of the horse and the note and mortgage for \$6,000.00, that he would buy the horse, and I told him no, and I explained to him that *Mr. Poindexter* had taken one

(Testimony of S. K. Watson.)

share and figured on getting six more men in the company, and he said he would not mind to buy the remainder of the stock himself, and so Mr. Poindexter came in that morning, if I remember right, and I told him about Mr. Stroh and asked him if he knew Stroh and asked about the note and mortgage, and he asked me where the note and mortgage was, and I told him that Stroh said it was in the Bank of Winona, and Mr. Poindexter says, "I will find out; I will go over to the Bank of Farmington and have my banker phone," and when he started out, he said that he did not have any change with him, and I gave him a \$20 bill to pay for the 'phone call, and the Bank of Farmington 'phoned down there and Mr. Poindexter came back and said that the Bank of Winona says he has it there, and he gave me \$19.75 back, and told me to let [112] Mr. Stroh have the balance of the stock as "We need the horse in the country," and while we were around there Mr. Knight was one of the men he tried to sell part of this horse to, and Mr. Poindexter wanted to know of me if the horse was not a little thick of his wind, and I told him that he had had the distemper and had not quite recovered, but that he would get over it in a short time, I thought. I moved him from Garfield to Farmington, and showed him on the streets, and took him to the scales and weighed him. He was a two year old and weighed 1970 pounds, and we did not consider there was a defect in the horse. We all know that it is hard to get a stallion absolutely sound in wind, and we did not consider that anything at all, and I told Poin-

(Testimony of S. K. Watson.)

dexter that if he did not show up all right on his wind, that there was a special guaranty on this horse, and he could change him; I told Mr. Poindexter that if this horse did not give satisfaction in every way that they could return him, and Ruby's stenographer wrote in the contract that if this horse did not get 60 per cent of the mares—I told him if this horse did not give satisfaction in every way that they could return the horse. I told him in case the horse's wind, if it did not come out satisfactory, that the guaranty was back of it, and they could bring the horse back and get another one at any time; and then when Mr. Poindexter told me that Stroh, if he wanted the horse, to let him have it all, or if I could not sell him the balance of it, and I told him that I could not take the mortgage, as I did not have any authority to pay out money, and Mr. Poindexter made the remark to let him have the balance of the horse, and that night, on the 16th, the day before I left Farmington, Mr. Stroh came to the hotel after supper and we talked awhile, and we went up in the parlor and signed this note, and he asked me about the terms, and Mr. Kerston was with him, and they went up into the [113] parlor at the hotel. I have been under the impression that Kerston went with us, and Stroh asked me all about the terms of this note he was signing, and I told him what it was and he signed the note and accepted of the bill of guaranty at that time.

Q. Did you say the guaranty?

A. You refer,—I mean the bill of sale, Exhibit "G." He signed this note and Mr. Poindexter had

(Testimony of S. K. Watson.)

already signed it prior to that and Stroh signed that at the same time.

Q. Had Mr. Poindexter previously signed the guaranty?

A. Yes, sir, when he signed the note; and the next morning Poindexter came in and I said, "Stroh was over to the hotel last night and took the balance of the stock," and Poindexter said it was all right, and Stroh still worked over across the street, and I made out the receipt and Mr. Poindexter signed it.

Q. You refer to Plaintiffs' Exhibit "F"?

A. Yes, sir; on February 17th, the day I turned the horse over and left Farmington, and I wrote the receipt out and Mr. Poindexter signed it and I wrote up the application for insurance and Mr. Poindexter paid one-seventh of that.

Q. The application for insurance is marked Plaintiffs' Exhibit "A-2"; is what you refer to.

A. Yes, sir; and Mr. Poindexter signed it and paid me to the best of my knowledge on the Farmington Bank by a small check, I think it was. He paid me, anyway, and he had a certificate of stock for \$400.00, paid in full and he,—and I took Exhibit "A" and wrote on it "Paid by Thos. S. Poindexter \$400.00"; it was endorsed in his presence, and he wanted to know if it was on there and I showed him that it was and he took a receipt. That was the same time that the receipt and application were written up. [114] After we went downstairs Stroh and Kerston came in. They had been to dinner together and after dinner Stroh and Kerston and myself went up into the

(Testimony of S. K. Watson.)

parlor, and Stroh first signed the receipt for the horse and H. W. Kerston signed it as a witness to Stroh's signature on this receipt, and I said to Stroh that Poindexter paid his part of the insurance, and he wanted to know what his part of the insurance was, and I told him and he went over to the bank and was gone a few minutes and came back and said the bank wanted 12 per cent interest, and he wanted to know if he could not give me a note for sixty days payable to the insurance company, and I told him he could. I wrote up the note for his part of the insurance and he signed it and I mailed it that day.

Q. You heard the testimony of the hotel man, Mr. Haines? Yes, sir.

Q. Wherein he testified that he saw Stroh and Poindexter sign that written instrument marked Plaintiffs' Exhibit "A" on the table in the hotel, both at the same time?

A. No, sir; Haines did not see Stroh sign his name and Stroh did not see Poindexter sign his name. They signed the note, application and bill of sale when Stroh was not present when Poindexter signed, and Poindexter did the same thing when Stroh was not present.

Q. You heard the testimony of Poindexter that when he signed Plaintiffs' Exhibit "A" that none of the portion thereof which is in writing was in the note. What are the facts about that?

A. The note was just in the condition it is now. It was written up and Poindexter read it over and hesitated on signing it as it was a note for \$2,800.00, and

(Testimony of S. K. Watson.)

he knew at that time that all the parties were satisfactory [115] to him would all sign it, and he knew at that time it was no receipt for the horse because at that time I had not sold the horse. It was preliminary and the first steps towards selling the horse, this Exhibit "A," in the sale.

Q. When Mr. Poindexter signed Exhibit "A" was anyone else present besides yourself?

A. Mr. Sullivan just came in from the barn and was present, and it was at meal time and Haines was waiting on the table and was back and forth in the office after we came in there, but I do not believe, I could not say—I could not say positive in regard to Haines being in there at that time.

Q. Where in the hotel did Mr. Poindexter sign Exhibit "A"?

A. On the showcase right this side of the counter.

Q. And where was the showcase?

A. In the hotel office.

Q. Where is the parlor you spoke about?

A. The parlor is upstairs on the second floor.

Q. What was the condition of the weather at the time you moved the horse from Garfield to Farmington?

A. On this particular day the snow was pretty deep.

Q. How far is it between those places?

A. Eight or nine miles.

Q. Did you take the horse over?

A. No, sir, Sullivan and the liveryman at Garfield did.

(Testimony of S. K. Watson.)

Q. Do you remember the circumstances of Henry Stroh coming to Portland sometime in July and bringing that horse?

A. Yes, sir.

Q. Tell the jury what took place.

A. The first I knew was that Stroh had the horse in the livery-barn. Mr. Ruby was in Europe and I was at home, and Mr. Stroh called me up some time in the morning and told me he had brought the horse back to exchange and [116] I made arrangements to meet Stroh at the barn where he told me this horse was.

Q. Where was the horse?

A. In a man's barn by the name of Walker. I got an automobile and Stroh went out with me to Ruby's farm about ten miles east on the base line, and Stroh went out there for the purpose of seeing about getting another horse, and I told him he could have any there, and he looked them over and did not see that we did have a horse the equal of this horse, and I told him that was up to him. We offered anything we had and we had some good horses on hand. We had six head of Percherons ranging from two to five years old and ranging from 1600 to 2,000 pounds, and I told him we would give him the same guaranty with any of them, but he insisted we did not have anything to suit him, but insisted that we take this horse; and when I saw that we could not satisfy him on a horse, I told him we would have a new importation soon and on the arrival of those horses that we would notify him to come and get one and he could have any on hand. He

(Testimony of S. K. Watson.)

said he would leave his horse in the barn. I would not accept the horse he had then as Ruby's representative, and so I went back home and Mr. Stroh,—I went back with Mr. Stroh to the barn and called Walker out as a witness and told him that we could not satisfy Mr. Stroh in exchange, but on the arrival of the shipment from Europe we would notify Stroh and he could have any horse that we had, and I did not see Stroh afterwards. He did not call me up but Judge Day, his attorney—

Q. Did you get in the importation of horses?

A. Yes, sir.

Q. How many head? Do you know?

A. Somewheres between thirty and forty. [117]

Q. And did you notify Mr. Stroh that they were in? A. Yes, sir.

Q. Did he come down afterwards, to Portland?

A. I never saw him down there but I understand that he came. I saw him on one occasion after that.

Q. On that occasion state to the jury whether or not you made an appointment with Mr. Stroh to meet Mr. Ruby with reference to an exchange.

A. The time I met him,—after that he called me up and told me to get him a meeting with Mr. Ruby and I made an appointment for ten o'clock the next morning at the Imperial Hotel, and I told Mr. Ruby about it and he said he would meet Stroh at the appointed hour, and I met Stroh before I got to the hotel the next morning, and I was going up in the Chamber of Commerce and Stroh was on the ground floor, and I told him I was just going up to the hotel,

(Testimony of S. K. Watson.)

and when he come to the floor that Judge Day's office was on, he got off and I went on up to the hotel and I never saw him after that. I came back and went up to the hotel with Mr. Ruby and Stroh did not show up, he never did go out to see Ruby.

Q. Was Mr. Stroh out to the farm after the first time to see the horses?

A. I understood he was out there.

Q. Was that the time he came to town first with the stallion?

A. I think he was down the next day and took four men out with him.

Q. That was before you got the importation in?

A. Yes, sir; that was the first time he was there.

Q. Now, these horses which you showed Stroh and which he refused to accept, I will ask you to state if any of those stallions were shown at the Walla Walla fair.

A. Yes, sir, I showed two of them there myself. [118]

Q. What is the fact as to their carrying off any prizes?

A. I showed two of the horses at the Walla Walla fair. One of them won one first blue ribbon against sixteen horses and was entered in the grand champion and won the grand cup for all stallions of any age or breed and was sold to a bunch of farmers three weeks afterwards, a bunch of ten men for \$3,000.00.

Q. Now, you heard Mr. Stroh tell that he came down to Portland with a certified check for \$2,800.00?

A. He did not owe but \$2,400.00.

(Testimony of S. K. Watson.)

Q. Did he say anything to you about a \$2,800.00 check?

A. No, sir, I would sure have accepted it if he had.

Q. I believe he said a draft rather than a check. Did you see any draft for \$2,800.00?

A. I did not see no money at all.

Q. Do you know the witness, G. B. Whitney?

A. Yes, sir.

Q. Did he ever work for A. C. Ruby?

A. Not to my knowledge, no, sir.

Q. You heard his testimony with reference to a conversation claimed to have had with you down at Garfield or Palouse within two weeks after the sale of this stallion to Stroh and Poindexter in which he said you told him you expected that the horse would be in Portland before you got back there?

A. Yes, sir I heard it, but it is not true.

Q. You heard his testimony about you did not dare to bring the horse in Idaho to sell?

A. No, sir; it is not true because you could not enter no horse in Idaho without a veterinary's inspection, sound or unsound, and I would have no object in telling him that. [119]

Cross-examination by Mr. ORLAND.

Q. When did you say that Mr. Poindexter signed Plaintiffs' Exhibit "A," this note?

A. He signed it according to the date of this paper on February 14th.

Q. You say he signed it the day that the paper is dated?

A. I think they—that he did unless there was some

(Testimony of S. K. Watson.)

mistake in making the date of the paper.

Q. You do not know that is correct?

A. Of course, I am pretty positive as to the date.

Q. You say that Poindexter signed that note for \$2,800.00, and gave it to you?

A. I wrote the note up and Mr. Poindexter signed it and gave it to me.

Q. And you carried it around in your pocket, did you? A. Yes, sir.

Q. How long had you known Poindexter?

A. Not very long, but of course I had heard Mr. Poindexter's name mentioned because he was an old resident and I was myself.

Q. You knew him, did you? A. No, sir.

Q. You say he gave the note to you and you carried it around in your pocket three or four days before the deal and the note was finally consummated?

A. Yes, sir.

Q. And that is represented by a certificate of stock for \$400.00? A. Yes, sir.

Q. He did not owe anything, did he?

A. No, sir, only he was obligated to sign the note and help get the company together.

Q. He did not owe Ruby Company anything? [120]

A. No, sir.

Q. He signed the note and let you have it in your pocket? A. Yes, sir, to show to others.

Q. Did he not know that Stroh signed it?

A. No, sir, only that his signature is on here.

Q. But you saw Stroh sign it?

(Testimony of S. K. Watson.)

A. Yes, sir, I did.

Q. You say you had a conversation with Mr. Stroh in which he told you he had some negotiable papers at the bank of Winona?

A. Yes, sir, and he wanted to trade me.

Q. You made no investigation of those?

A. No, sir, I told Mr. Poindexter and he said that he could find out by going over to the Bank.

Q. What interest was it to Poindexter to find out?

A. Mr. Stroh was taking an interest in the horse.

Q. Could you take the mortgage?

A. I could not, as I had no authority to pay out cash and I would have had to pay him \$3,600.00, difference.

Q. You say you gave Mr. Poindexter a \$20.00 bill to telephone. Did it cost that?

A. He gave me \$19.75 back and told me that the Bank of Farmington had ascertained that Stroh's mortgage and note was in the Bank of Winona.

Q. Did you think that Poindexter could not get \$.25 to pay for the telephone at the time at the bank?

A. No, sir, I did not think that at all.

Q. Now, you say that Sullivan was present when Poindexter signed that note? A. Yes, sir.

Q. Why did you not mention that before at the other trial?

A. I think maybe I did say something about other parties being there, but taking that long a time away and it was hard to remember. [121]

Q. You have discovered that since the last trial?

A. I do not know about that, but I knew that there

(Testimony of S. K. Watson.)

were others in the room.

Q. You are in the employ of A. C. Ruby?

A. Yes, sir, I sell a good many of his horses.

Q. You have been in his employ ever since this deal with Poindexter and Stroh, have you not?

A. There have been times I have not. I am a farmer myself and run that.

Q. How long before that had you been working for Ruby? A. Off and on for six years.

Q. Is Sullivan an employee of A. C. Ruby?

A. No, sir.

Q. He was there at that time with the horse?

A. Yes, sir, he worked for me.

Q. He did not work for Ruby?

A. He was in my employ.

Q. Is he now? A. Yes, sir.

Q. And has been ever since this sale?

A. Yes, sir.

Q. And for how long before?

A. He has worked for me for four years.

Q. When you talked with Poindexter with reference to Stroh taking an interest in the horse he told you to let him have it all?

A. And I told him I could not take the mortgage because I could not give him the difference between the mortgage and price of his share in cash.

Q. He told you that he did not want any interest in the horse, did he not?

A. He always wanted an interest in it.

Q. You gave him that before you saw Stroh?

A. Yes, sir. [122]

(Testimony of S. K. Watson.)

Q. But after you saw Stroh did he not tell you to let Stroh have it all?

A. Yes, sir, I think he said something about that.

Q. Did not Poindexter tell you when you spoke to him about Stroh that he did not know anything about him financially?

A. He said he knew the land.

Q. And you told him that Stroh said he had the papers or mortgage in the Winona Bank?

A. Yes, sir; and Poindexter told me that he would go and telephone, and he took 25¢ out of my money to pay the telephone charge, and I think he did or had the bank or somebody telephone.

Redirect Examination by Mr. NEAL.

Q. I think you testified that the consideration for turning over to Poindexter that certificate of stock for one share paid up was the consideration for his signing the joint note?

A. Yes, sir; in order to consummate the sale and get the \$400.00 worth of stock.

Q. What did you tell him as to his signing the joint note?

A. I told him it was a joint note when he signed it, and he hesitated on signing it because he said he could be held for the whole note.

Recross-examination by Mr. ORLAND.

Q. Do you know what became of the horse?

A. Not from my own knowledge, but I understood he was sold in Portland for the feed bill.

Q. Mr. Stroh never shipped him back?

(Testimony of S. K. Watson.)

A. No, sir, he was sold in Portland for his feed bill.

(Witness excused.) [123]

[Testimony of H. W. Keston, for Plaintiffs.]

H. W. KESTON, being first duly sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. NEAL.

Q. State your name. A. H. W. Keston.

Q. What is your business or occupation?

A. I am farming.

Q. Where were you residing in February, 1911?

A. I was at Tekoa, Washington.

Q. And at that time were you acquainted with Henry Stroh? A. Yes, sir.

Q. Do you remember of meeting Henry Stroh at the time in the hotel in Farmington?

A. I wanted to go to Colfax and I came to Farmington and met Henry Stroh on the street, and he told me he intended to buy a stallion, and I went up to the stable and looked at it, and I saw Watson there.

Q. Did you ever see Watson before that time?

A. No, sir.

Q. Then what did Mr. Stroh do?

A. I—two days afterwards when I first met him, I wanted to go out of town again and I met Stroh and he says, "I want to buy the horse now. My wife is all right now."

Q. His wife was satisfied then?

A. Yes, sir, and we went into the room and found Mr. Watson *and his name* and Jim Sullivan and he

(Testimony of H. W. Keston.)

wanted the contract, that he was satisfied and wanted to make the papers out, and a little bit after we went upstairs, Watson, me and Stroh, and Stroh signed the papers, and me too.

Q. I call your attention to Plaintiffs' Exhibit "F" and ask you if that is the paper you saw Stroh sign.

A. It seems to be the paper. That is Henry Stroh's name. [124]

Q. And that is your signature?

A. I think so, but it is three years ago and I cannot recollect very well.

Q. Is that the only paper you witnessed there?

A. Yes, sir.

Q. Did you hear at any time you were there with Mr. Stroh and Mr. Watson how much he would have to pay for this stallion?

A. It was in the paper. He was to pay \$2,400.00 and it was in the paper some place, I remember.

Q. Did you see this paper at all, referring to Plaintiffs' Exhibit "A"?

A. No, sir, I just signed my name to the one.

Q. Mr. Poindexter was not there, was he?

A. No, sir, I did not see Poindexter there at all.

Cross-examination by Mr. BROWN.

Q. Do you own a farm near Farmington?

A. No, sir; I stay with a friend there.

Q. You stay with a friend there?

A. Yes, sir, Lester Morrison.

Q. How long have you been living there?

A. About nine months.

Q. Where were you living at the time you signed

(Testimony of H. W. Keston.)

this paper? A. I was near Tekoa.

Q. You just happened down there at that time?

A. Yes, sir.

Q. In the paper you signed your name to it said to pay \$2,400.00 for the horse.

A. Mr. Watson read the paper.

Q. And it said that?

A. I do not know anything about that.

Q. Why did he read it over? [125]

A. He said the horse was \$2,400.00 and wanted so much time to pay it in and I do not know how much.

Q. That was the paper you signed?

A. Yes, sir.

Q. Now, Bill, did Watson give you any money for going up there?

A. He paid my expenses for staying in town.

Q. How much did he pay you?

A. \$25.00.

Q. When did he pay you that?

A. Before I signed the paper.

Q. He gave you \$25.00 to put your name on the paper, was it? He paid you for that?

A. Sure.

Q. Did you understand the question, Witness?

A. I signed the paper but he did not pay me for that. I stayed three or four days in town.

Q. At that time?

A. Yes, sir, and that was what he gave me the money for.

Q. Did he give you that before or after you signed?

A. When he went away the first time, Mr. Stroh,

(Testimony of H. W. Keston.)

Mr. Watson asked me if I would be around again, and I told him I wanted to go to Colfax and did not have the money to stay in town that long.

Q. And how long did you stay there?

A. When he sold the horse he gave the money to me three or four days after. I do not remember exactly.

Q. He gave you \$25.00? A. Yes, sir.

Q. And what did he give you that for?

A. To pay my expenses.

Q. Did you see Mr. A. R. Knight and Thomas Poindexter, on the 8th of May at Lester Morrison's place? [126] A. Yes, sir.

Q. Did you have any talk with them about the \$25.00?

A. Yes, sir, I did. They asked me about it.

Q. Did you not say to Thomas Poindexter and A. R. Knight, at Lester Morrison's place on May 8th that Watson gave you \$25.00 to sign a paper as a witness that Stroh gave Watson, wherein Stroh was to pay \$800 in cash and a note for the balance to pay the price of a horse?

A. I told Mr. Knight that one note I signed between Stroh and Watson.

Q. Did you not tell them what I read you?

A. No, sir, I said he gave me \$25.00. He paid me \$25.00 for my expenses while in town.

Q. Did you tell them in that paper that Stroh signed he was to pay \$800.00 in cash and give a note and mortgage to secure the other money?

A. I told them what I understood, that he was to

(Testimony of H. W. Kerston.)

pay \$800, in cash and give a mortgage on a ranch. That was the understanding.

Q. That was the understanding of the contract between Stroh and Watson as they stated to you at that time?

A. Yes, sir, but I do not know nothing about Poin-dexter signing the paper.

Redirect Examination.

Q. All you know about the note is that you heard the conversation in which Watson stated there were certain payments to be made on the note. Is that all?

By Mr. BROWN.—I object as leading.

By the COURT.—Sustained. [127]

To which ruling of the Court plaintiffs then and there excepted and which exception was duly allowed.

Q. Now, Mr. Kerston, as I understand you, you did not read over the instrument you signed to know what was in it? A. No, sir, I did not read it.

Q. You just signed it as a witness to Stroh's signature? A. Yes, sir.

Q. When you came up there, Mr. Kerston, did you tell Mr. Watson that Stroh asked you to come up there as a witness for him?

A. I told Stroh I would.

By the COURT.—Did you tell Mr. Watson when you came up there that Mr. Stroh asked you to come up there as a witness? A. Yes, sir.

(Witness excused.)

[Testimony of James Sullivan, for Plaintiffs.]

JAMES SULLIVAN, being first duly sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. NEAL.

Q. What is your name?

A. James Sullivan.

Q. Where were you in February, 1911?

A. In Farmington, Washington.

Q. You were employed by Mr. Watson?

A. Yes, sir.

Q. You were looking after the horse Ithos?

A. Yes, sir.

Q. Do you remember the circumstance of Thomas Poindexter signing Plaintiffs' Exhibit "A." [128]

A. Yes, sir.

Q. I will ask you to state whether or not at the time Mr. Poindexter signed the note that the amount of the note and the payments were filled in.

A. Yes, sir.

Q. Where was that signed?

A. In the Farmington Hotel on the showcase.

Q. Did you see Mr. Stroh sign the note?

A. No, sir.

Q. You moved this horse Ithos from Garfield to Farmington? A. Yes, sir.

Q. Did you have any trouble in getting him over?

A. I got him mired down in the mud.

Q. What I meant to bring up, did you have any trouble getting him over on account of his physical

(Testimony of James Sullivan.)

condition? A. No, sir.

Cross-examination by Mr. BROWN.

Q. Who was present when Exhibit "A" was signed by Poindexter?

A. Mr. Watson and Mr. Poindexter.

Q. Was anybody else present?

A. No, sir, nobody.

Q. And it was signed whereabouts in the hotel?

A. On the show case in the cigar-stand.

Q. And what time of day was it?

A. Just about dinner-time.

Q. And no one else was about? A. No, sir.

Q. No one was in the office of the hotel?

A. No, sir.

Q. Where were you standing when the paper was signed?

A. Right close to the counter.

Q. Who asked you to go there? [129]

A. Nobody.

Q. How did you come to be there?

A. I was in there waiting to go to dinner.

Q. Did Mr. Watson ask you to see the signature made? A. No, sir.

Q. What did you stop there for?

A. I was not doing anything but waiting.

Q. You were not interested in the note, were you?

A. No, sir.

Q. Where did you stand with reference to Poindexter when he was signing?

A. Right alongside of him.

Q. To his right or to his left?

(Testimony of James Sullivan.)

A. To his left.

Q. And where did Mr. Watson stand?

A. I do not just remember.

Q. You do not know whether he was there, Watson?

A. I saw Poindexter sign his name, and Watson was there but I could not say just where he was standing.

Q. What interest did you have to look at the note to see if it was filled up? A. None.

Q. And notwithstanding you looked at it?

A. Yes, sir.

Q. And you did not go to dinner until after the note was signed?

A. No, sir, I was waiting for Mr. Watson to go.

Q. You were working there for Mr. Watson?

A. Yes, sir.

Q. And you knew that there was a deal on between the parties? A. Yes, sir. [130]

Q. Did you look at the date of this instrument?

A. No, sir, I did not.

Q. Did you notice how the payments were to be made on this note? A. Yes, sir.

Q. How were they to be made?

A. In one, two and three years.

Q. When did you first see the note after it was signed at that time? A. Four days afterwards.

Q. And where did you see it?

A. On the train.

Q. Who showed it to you? A. Mr. Watson.

Q. And after it was signed you did not see it until

(Testimony of James Sullivan.)

four days afterwards? A. No, sir.

Q. And where were you going at that time?

A. To Garfield.

Q. And when did you see it next?

Q. You were not a witness in the former trial of this case, were you? A. No, sir.

Q. You observed the one, two and three year clauses in the note at the time it was signed?

A. Yes, sir.

Q. Did you take particular notice of it?

A. Yes, sir.

Q. Did you take any notice as to what the original amount in the note was? A. Yes, sir.

Q. And what was it? A. \$2,800.00 [131]

Q. How long did you stand there while Mr. Poindexter was signing the note?

A. Probably five minutes.

Q. Did Mr. Poindexter say anything?

A. Not that I heard.

Q. Did Mr. Watson say anything?

A. Not that I heard.

Q. Where was Mr. Haines, the proprietor of the hotel? A. I do not know.

Q. Was there anybody in the hotel office at that time? A. No, sir.

Q. This showcase you spoke of is on which side of the office? A. I think it is on the west side.

Q. Was it a glass case? A. Yes, sir.

Q. And what was in it? A. Cigars.

Q. Was it sitting on the office desk or—

(Testimony of James Sullivan.)

A. It was sitting on the floor. It was a case by itself.

Q. Was it near the wall? A. Yes, sir.

Q. How long a case was it on which that note was signed?

A. I should judge about three and a half or four feet.

Q. And you were on the right or left hand side?

A. The left side.

Q. Where did he get the ink?

A. I think it was a fountain pen they used?

Q. Do you know that he had a fountain pen?

A. No, sir, I do not.

Q. There was a pen in the book where the guests sign? A. I do not remember. [132]

Q. Were you stopping at the hotel?

A. Yes, sir.

Q. How long had you been stopping there?

A. Seven or eight days.

Q. And you do not know where they took the ink from? A. No, sir.

Q. If you were standing to the left of Mr. Poindexter as he was signing the instruments, you would be next to the wall? A. Yes, sir.

Q. And he was farther out in the room?

A. Yes, sir.

Q. You do not know whether Mr. Watson stood on the other side or not? A. No, sir.

Q. What did he do with the note after he signed it?

A. I do not know.

Q. You do not know whether he put it in his pocket

(Testimony of James Sullivan.)

or did something else with it?

A. No, sir, I do not.

Q. Was there any indorsement on the back of it at the time he signed the note?

A. I did not see the back of it.

Q. Was there any indorsement made on the note in your presence? A. I did not see any.

Q. Are you sure that it was signed on this cigar-case? A. Yes, sir.

Q. You are as sure of that as you could be of anything else you have testified to? A. Yes, sir.

Q. Is it not a fact that the top of the cigar-case is oval or round, and not flat? [133]

A. I do not think so. I think it is flat.

Q. Are you positive that it was flat and that he laid it right down on the showcase? A. Yes, sir.

Q. Is it not a fact that the cigar-case where you say there was a cigar-case, that it is oval and has no top to it at all? A. No, sir, I think it is flat.

Q. But you know it was signed on that even if it was oval? A. Yes, sir.

Q. Over to the right of that, assuming that this is a bookcase, and over to the right was a register, blotting paper, ink and pen? A. I never saw any.

Q. Did you not see any of that on the hotel desk?

A. No, sir.

Q. How long did you stay there?

A. From about the 5th to the 17th.

Q. And you never discovered a book to register in?

A. Yes, sir.

Q. Not that laid over to the right of the cigar-case?

(Testimony of James Sullivan.)

A. I think so.

Q. And pen and ink was a little business that turned around? A. I guess there was some.

Q. Did Mr. Poindexter take that pen and ink and write from there, or did he walk over here?

A. He stood right there.

Q. You do not know whether he wrote it in with a fountain pen, or not?

A. No, sir, but I think he signed it with a fountain pen. [134]

Redirect Examination by Mr. NEAL.

Q. Where did Mr. Poindexter go after he signed this note? A. He went to dinner.

Q. Did Mr. Poindexter go into dinner with you and Watson? A. Yes, sir.

Q. And this was just before dinner?

A. Yes, sir.

(Witness excused.)

By Mr. NEAL.—I desire to read, Mr. Orland, in evidence the deposition of Judge O'Day, and presume you will waive the reading of the stipulation.

By Mr. ORLAND.—Yes, sir.

(Deposition of Judge O'Day read to the jury.)

**[Testimony of S. K. Watson, for Plaintiffs
(Recalled).]**

S. K. WATSON, being recalled as a witness on behalf of the plaintiffs, testified as follows:

Redirect Examination by Mr. NEAL.

Q. You heard the testimony of Mr. Keston in which he stated that you had given him \$25.00 for his expenses?

(Testimony of S. K. Watson.)

A. Mr. Keston was in Farmington and he come down to the barn with Mr. Stroh the first time he came down there, and he said that Stroh liked the horse very much. Keston told me that he thought he might help out with the sale and I told him I would not forget him if he did, and when we got through with the sale,—I had no bargain with him whatever,—but I gave him \$25.00 to pay his expenses. [135]

Defendant's Rebuttal.

**[Testimony of Thomas S. Poindexter, in His Own
Behalf (Recalled).]**

THOMAS S. POINDEXTER, being recalled as a witness in his own behalf, testified as follows:

Direct Examination by Mr. ORLAND.

Q. You heard the testimony of Mr. Watson with reference to having given you a \$20 bill to go to telephone? A. Yes, sir.

Q. State if he did. A. He gave me nothing.

Q. Did you go to the bank to telephone?

A. I did not.

Q. Did you ever telephone to the Bank of Winona to find out about the mortgage of Mr. Stroh's?

A. No, sir.

Q. Did anyone telephone for you? A. No, sir.

Q. Did you ever give Mr. Watson \$19.75 back in change? A. I did not.

Q. You heard the testimony of Watson in regard to his telling you it was a joint note when you signed it? A. I did.

(Testimony of Thomas S. Poindexter.)

Q. Was anything of that character said to you?

A. No, sir.

Q. Or anything else other than what you have detailed upon the witness-stand? A. No, sir.

Q. Do you know the witness, Sullivan?

A. Yes, sir.

Q. Was he present at any time when you signed any papers? A. He was not.

Q. Was he present when you signed this note?

A. He was not. [136]

Q. You heard him testify here that you signed Plaintiffs' Exhibit "A" on a showcase in the office of the hotel? A. Yes, sir.

Q. Do you know what shape that showcase is?

A. Yes, sir, I do.

Q. The shape of the showcase where he stated you signed the note?

A. Yes, sir, the showcase is four or five feet long and stands north and south in the building and runs up to a corner, and the other part of the showcase goes on down to the dining-room table; and that part where he says I signed is oval and it would be very difficult to sign any paper whatever on; and the other showcase is six feet, down the other way, where he keeps the hotel register, and the pen and ink is all there together.

Q. You also heard the testimony here that you went into the parlor and signed some papers. You may state if you signed any papers in connection with this transaction in the parlor of the hotel.

A. I did not.

(Testimony of Thomas S. Poindexter.)

Q. Did you ever see Mr. Keston in connection with any signing of papers anywhere? A. No, sir.

Q. He never witnessed your signature anywhere?

A. No, sir.

Cross-examination.

Q. Is there a portion of the showcase that is flat on top? A. Yes, sir.

Q. After the note was signed, or at any time, did you go into the dining-room and have dinner with them there? [137] A. I might have sometime.

Redirect Examination.

Q. Now, the day you signed Plaintiffs' Exhibit "A," you say was the last day Watson was there. Did you eat dinner with Watson that day?

A. No, sir, not the last day.

Recross-examination by Mr. NEAL.

Q. You say you signed Exhibit "A" on the last day that Watson was there? A. Yes, sir.

(Witness excused.)

By Mr. NEAL.—If the Court please, at this time, in order to save my record on the question of the negotiability of this note, I desire to move the Court to instruct the jury to return a verdict for the plaintiffs upon the ground that the note sued upon is an negotiable instrument and the evidence shows, as it appears from the depositions of J. M. Leiter, A. C. Ruby and Floyd J. Campbell, which were offered in evidence and rejected by the Court and an exception allowed, that the plaintiffs herein are *bona fide* owners and owners of the note in due course for value.

without any notice of the defenses claimed by the defendants.

By the COURT.—The motion will be denied.

To which ruling of the Court plaintiffs then and there excepted, and which exception was duly allowed. [138]

By Mr. NEAL.—Would the Court indicate what will be submitted to the jury? Will that be similar to the instructions in the other case or will the other question be added?

By the COURT.—I shall have to submit the latter questions as to whether or not Ruby & Company were willing to make good their guaranty.

(Argument.)

Instructions to the Jury by the Court.

As you have already, gentlemen of the jury, been doubtless made to understand, this suit is founded upon this written instrument which has been read to you and exhibited to you, denominated a STOCK-HOLDERS' PURCHASING CONTRACT. In language it is (here the instrument was read to the jury), and more or less it has been referred to during the course of the trial as a promissory note. It appears to be signed by the defendant and Henry Stroh, one of the witnesses. I will say that it is wholly unimportant that Henry Stroh is not a party to this suit, and you should be wholly uninfluenced by the fact that he is not made a party to the suit.

It is furthermore unimportant to you whether this instrument is to be called a promissory note or sim-

ply a contract. In other words, it makes no difference whether in law it is to be deemed a promissory note or a contract. In either case the defendant is bound if he signed it and if the consideration therefor has not failed, as I shall explain to you in the course of my instructions.

The plaintiffs here are assignees of this instrument, having secured the same from the original payee, A. C. Ruby. In [139] other words, you understand that on this paper's face it is payable to A. C. Ruby, and it was agreed during the course of the trial, that the plaintiffs here took an assignment of it and therefore have the same rights here as A. C. Ruby would have if the company were suing and not the plaintiffs. The plaintiffs have no greater right. Sometimes where an instrument is in what we call a negotiable form, as a check or ordinary promissory note, the *transfee* of such instrument has rights greater than the payee; but, for certain reasons which are unnecessary to explain you, I have held as a matter of law that this is not a negotiable instrument in the sense that the purchaser of it has greater rights than the payee; and therefore I say to you that the plaintiffs here stand in the shoes of A. C. Ruby, and have just as much right as he would have if it had never been transferred, but no greater right.

In this connection it is proper to call your attention to another feature of the case, and that is, it is ultimately immaterial to you whether the defendant Poindexter received all or only a part of the consideration for this instrument. In other words, it is

no defense in itself that he was to have, according to the testimony, only a part interest in the horse; that was purchasing and owned only a small interest in the horse. If he signed this instrument in the form in which it now is, and, if there was no breach of the warranty of the horse, or if A. C. Ruby & Company were willing to make good the breach of the warranty if there was one, then the defendant is liable here even though he got only a small interest. That is, he is liable for the full amount. As between him and Henry Stroh his rights would be different. If the instrument is a valid instrument against both, and Mr. Poindexter were compelled to pay it, Mr. [140] Poindexter could recover from Mr. Stroh the part he should have paid. I do not know that I need to explain that principle, for you no doubt are all aware of the rule; for instance, one of you wants to borrow \$100 from a bank and the banker says, "Get a signer," and some other man signs the note and you get the \$100; in such case the man is liable for the full amount of the note although he got no part of the money. But, of course, if he has to pay it, he can compel you to reimburse him for his loss. So coming back to this matter, if Mr. Poindexter is compelled to pay all of it to the plaintiffs, he could compel Mr. Stroh to pay him.

These are somewhat unimportant matters, and yet, in view of the range the argument has taken, I have thought it prudent to impress these principles on you in order to present clearly the real issues.

There are in reality two primary questions, and this is the first question: I want to make it clear to

you and as simple as possible. The first question is: Was this instrument (called Stockholders' Purchasing Contract) in the form in which it now appears when Mr. Poindexter signed his name to it? He admits here upon the stand that this is his signature. However, his first defense is that when he signed his name there the instrument was practically a blank. In other words, there was a printed form, but the written matter was not then entered, and that therefore it must have been filled out later by some other person, probably the holder. I say, this is his defense. The testimony, as you will observe, is conflicting upon that question. One or two of the witnesses say the instrument was a blank and others say it was filled out in the form in which it now appears. There are some circumstances tending to corroborate the plaintiffs and some the defendant, and it is for you, gentlemen, as best [141] you may, to carefully canvass all the testimony and try to reach a conclusion upon which side the truth lies. If you find with the defendant that this instrument was a blank, your verdict should be for the defendant, because he would not be bound by the action of anyone in later filling in the amount of the note. If, upon the other hand, you find he did sign this in its present form, then he is, upon the face of the instrument, bound by it and should be required to pay it, unless you find in his favor upon the other matter which I am about to call your attention.

I may say that the defendant having acknowledged his signature, this instrument makes a *prima facie* case for the plaintiff, and therefore the burden is on

the defendant to show by a preponderance of the evidence that it was not in this condition when he signed it. A preponderance is a greater weight of the evidence; not necessarily a greater number of the witnesses, but a greater weight; that which strikes you as being more credible and convincing. Assuming that you may possibly find against the defendant on that issue, we pass to the other question, and that is, the warranty.

It seems that at the time, or about the time, this transaction took place, the A. C. Ruby Company executed and delivered to the signers of this instrument what has been referred to as the guaranty or warranty,—this written instrument which I hold in my hand, and you will take it as embodying all the material representations which were made by A. C. Ruby Company to induce the defendant to sign the note or to purchase the horse. It is provided in the instrument, among other things, “that if the above-named stallion does not give satisfaction in every respect”—I think you may read it that way,—“so that if the above-named [142] stallion does not give satisfaction in every respect and get sixty per cent of the mares returned for second trial, we—that is, A. C. Ruby,—agree to furnish another stallion of the same quality and price on the delivery to our barns in Portland, Oregon. If the stallion above named should not be a breeder or true to pedigree furnished, we agree to furnish, etc.” You will see that the warranty or guaranty is very broad. It provides that if the animal does not give to the purchaser satisfaction in every respect, the purchaser has the priv-

ilege of returning him and getting another as good as this one was represented to be. In other words, if he was not satisfactory in every respect, it was the privilege of Stroh and Poindexter to return him and demand another.

Now, the first question of fact for you to consider under this warranty is as to whether or not there was a violation of it. Was this stallion Ithos up to the warranty? Was he a foal-getter? Was he satisfactory in every respect? I need not comment on that farther. It is for you to say whether he was up to this warranty. If you find that he was not up to the warranty, then what was the remedy? It was not to declare the bargain or transaction at an end and demand back the note, or, to refuse payment. The remedy was provided in the warranty; that is, to tender the horse back to A. C. Ruby and get such a horse as this one was represented to be, of the same grade, size and quality; such as they had a right to expect this one to be. That was their remedy, and the serious question here is as to whether or not it was tendered back; whether they did find him unsatisfactory, and, if so, whether they did make a tender, and the A. C. Ruby Company declined to make good their guaranty by delivering or transferring to them another horse of like breed and quality. Mr. Poindexter himself has stated that he did not make such a tender. I forget just what he did state, but I think he claimed that he turned his stock over to Mr. Stroh and that he himself did not [143] make such a tender, and hence, if it was made, it must have been made by Mr. Stroh. The mere fact that

Poindexter did not make a personal tender to the company would not make or constitute a refusal to tender, but either he or Stroh must have done so; otherwise the condition of the horse and his qualities as a foal-getter and all testimony relating to his being wind-broken would be immaterial; because, if they did not tender the horse back, they cannot complain that he was not up to the warranty. The testimony is conflicting upon this question. Stroh claims he made a tender and that A. C. Ruby had no such horse, none up to the standard of this horse; rather, of the quality he supposed it to be. If you believe his statements in that respect, you will find for the defense on that particular issue. On the other hand, Watson testified that they did have horses fully equal, and such horses were afterward taken to the fair and won premiums and were sold for a large price. Did Stroh tender the horse back in good faith, or, did he do so only ostensibly? Was he really willing to take any horse in exchange? Here, again, the burden is on the defendant, and he must show you by a preponderance of the evidence that the horse was not up to the warranty, and that he was tendered back to Ruby & Company, and that they were unable or unwilling to make good the warranty by giving another of the required standard.

It is for you, gentlemen, here, as in all jury cases, to determine the credibility of the witnesses and the weight to be given to their testimony. I do not intend to analyze the testimony or express an opinion as to its weight. That is a matter left entirely to you, and the responsibility will be upon you to do

justice between the parties.

Now, if you should find in favor of the plaintiffs, you should award to them \$2,400.00, together with interest thereon at eight per cent from February 14, 1911, and \$250.00 attorneys' [144] fees. Perhaps you can bear that in mind: \$2,400.00 principal and eight per cent interest from February 14, 1911. You can make a note of that now because I shall not send the pleadings with you. I doubt not that almost anyone of you can calculate the interest.

Of course, if you find for the defendant, your verdict will be for the defendant, and it will not be necessary for you to make any calculation.

It will be necessary for you to agree unanimously.

Two forms of verdict have been prepared for you; one is for the defendant, and if you agree on that your foreman may sign that. The other form is left for you to fill in, and that will be signed by the foreman after you have entered the amount.

By the COURT.—You may make your exceptions now if you desire, gentlemen.

[Exceptions in Behalf of the Plaintiffs.]

Exceptions in behalf of the plaintiffs are as follows:

The Court erred in refusing to give the following instruction No. 1, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“A negotiable instrument is a contract in writing whereby one or more persons promise to pay to the order of one or several persons a definite sum, at a

future time named in the instrument, and, under this rule the note sued on in this action is a negotiable, promissory note, and you should so regard it."

The Court erred in refusing to give the following instruction No. 2, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely: [145]

"A holder in due course is one who, for a valuable consideration, before maturity, takes such an instrument under the following conditions:

1st. It must be complete and regular upon its face, and I instruct that this note is such an instrument.

2d. He must have become the holder before the note was overdue, and, if you find the plaintiffs are such holders, they did become such before it was overdue.

3d. They must have taken it in good faith, and for value, as to this, if the plaintiffs had no notice that the defendant claimed fraud in the execution of the note, before they took the note from the A. C. Ruby Company, it would make no defense that you may find, as a matter of fact, that there was fraud in the securing of the note from the defendant by the A. C. Ruby Company or its agent. Under such circumstances, plaintiffs would take the note as holders in due course. If you find that the plaintiffs are the holders of the note in due course, then the fact that the defendant may have been induced to sign the note, though the representations that he has testified to, would not discharge him from liability on

the note as against the plaintiffs here, for, if the defendant had an opportunity to read the note, and failed in that regard, if he failed to investigate—to observe—to ascertain what the instrument was, in the hands of plaintiffs, if you find that plaintiffs are holders in due course, for value, defendant cannot be held to defend against it.

4th. At the time the note was negotiated, plaintiffs must have had no notice of any informity in the note. If you find that the plaintiffs are such holders of the note, then the fact that the defendant might have been induced to note, through [146] the misrepresentations he has testified to, would not discharge him from liability as against plaintiffs.”

The Court erred in refusing to give the following Instruction No. 3, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“One who takes negotiable paper, before maturity, for value, is entitled to recover against the maker, unless it is shown that, in the transaction by which title was acquired, the endorsee had knowledge of facts which would render the same invalid against the maker, or was guilty of bad faith, and the burden of proving such knowledge or bad faith is upon the defendant.”

The Court erred in refusing to give the following Instruction No. 4, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“The title to a negotiable promissory note passes by endorsement, and one who takes a negotiable promissory note by endorsement, before maturity, for a valuable consideration, in the regular course of business, without notice of infirmities, is called a holder in due course, and is entitled to collect it of the maker, even though the maker might have a good and valid defense against the original payee of the note.”

The Court erred in refusing to give the following Instruction No. 5, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely: [147]

“If you find, from the evidence, that when Campbell and Leiter received the note made by defendant, a copy of which is set forth in the complaint herein, in favor of the A. C. Ruby Company, they knew of nothing to apprise them, or put them upon inquiry with respect to the claim now made by the defendant that said note was given without consideration, or procured by fraud, your verdict should be for the plaintiffs for the full amount sued for.”

The Court erred in refusing to give the following Instruction No. 6, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“As to what notice of the infirmity of the note the plaintiffs should have had, I charge you that they must have had actual notice of some defect in the instrument. It is not sufficient to defeat their claim

that they are holders in due course, to show simply suspicious circumstances. You must be able to find from the evidence that plaintiffs did know—had actual notice—of the fraud claimed before you can consider the defense which the defendant imposes regarding the fraudulent character of the transaction by which the defendant claims he was induced to sign the note.”

The Court erred in refusing to give the following Instruction No. 7, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“I instruct you that nothing contained in the note itself would in any way be notice to plaintiffs of any infirmity in the note.”

The Court erred in refusing to give the following [148] Instruction No. 8, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“It is the part of ordinary prudence for one who is asked to sign a contract, or obligation relating to business matters of importance, to investigate, and failure to do so, to read when opportunity is given to read, to look when opportunity is afforded to look, to examine when the instrument is submitted for examination, precludes the defense that the paper is not what the signing party understood it to be. When that paper is put into circulation and falls into the hands of an innocent holder.

And, on the facts in this case, if you find the plain-

tiffs are holders in due course, and for value, as I have defined those terms, then plaintiffs are entitled to recover the full amount of the note with interest, and such further amount as you may find to be a reasonable attorney's fee, whatever might have been the result if this action had been between the original parties to it, namely, been brought by the A. C. Ruby Company, to whom the note was given."

The Court erred in refusing to give the following Instruction No. 9, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

"One who purchases a negotiable note for value, before maturity, does not owe the maker the duty of making active inquiry into the origin or consideration of the note before purchasing the same. The purchaser's right to recover can only be defeated by showing that he had actual notice of the facts which impeach the validity of the paper." [149]

The Court erred in refusing to give the following Instruction No. 10, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

"If you find the plaintiffs took this note, before maturity, for value, then they are entitled to recover against the defendant, unless you shall find from the evidence that it has been shown that in the transaction between plaintiffs and A. C. Ruby, by which plaintiffs acquired title to the note, that the plaintiffs had knowledge of facts which would render the

same invalid as against the defendant, or unless you find that the plaintiffs were guilty of bad faith in taking said note, and I instruct you that the burden of proving such knowledge, or bad faith, is upon the defendant.”

The Court erred in refusing to give the following Instruction No. 11, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“There is one other phase of the defense which might be noticed. It is claimed by the defendant that he was to have his share for nothing, but this does not constitute a defense, it does not exempt him from liability, since the only evidence of it comes from him alone, and he cannot be heard for this purpose to impeach the written agreement which he executed, by undertaking to contradict that written statement by oral testimony. If that could be done, there would be no sanctity to written contracts.”

And plaintiffs also except to the refusal of the Court to take from the jury the question or condition of the warranty of the horse, which exception was duly allowed. [150]

[Plaintiffs' Exhibit "A"—Stockholders' Purchasing Contract, Dated February 14, 1911.]

Leiter & Campbell v. Poindexter. Plaintiffs' Exhibit "A" for Identification. V. A. Crum, Notary Public. Nov. 11, 1912. H. P. Cummock. May 15, 1913.

STOCKHOLDERS' PURCHASING CONTRACT.

Feb. 14th, 1911.

After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53347 owned by the A. C. Ruby Co. of Portland, Ore., and recognizing his value as a means of improving our horse stock, we the undersigned subscribers, hereby purchase said stallion of the A. C. Ruby Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

\$2800.00. Portland, Oregon, Feb. 14th, 1911.

For value received I promise to pay to the order of the A. C. Ruby Co., the sum of Twenty Eight Hundred Dollars, payable at the Merchants National Bank, Portland, Oregon, in payments as follows:

One Thousand and no 00 Dollars....Oct.

1st 1911.

Nine Hundred and no 00 Dollars....Oct.

1st 1912.

Nine Hundred and no 00 Dollars....Oct.

1st 1913.

with interest from date at the rate of eight per cent. payable semi-annually, and if not so paid, the whole sum of both principal and interest to become due and

collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay reasonable attorney fees.

THOS. S. POINDEXTER.

HENRY STROH.

The A. C. RUBY CO.

A. C. RUBY. A. C. R.

Received payment as follows: 2/17 1911. Paid by Thos. S. Poindexter \$400.00, one-third to be applied on each of the three payments.

No. 525. Nov. 12, 1912.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [151]

[Plaintiffs' Exhibit "A-2"—Application for Insurance, Dated February 17, 1911.]

Plaintiffs' Ex. "A" #2. H. P. Cummock.

SPECIAL APPLICATION to be Used for Registered Stallions and Mares.

Application of Thomas S. Poindexter and Henry Stroh.

City or Town, Farmington. County, Whitman; State, Wash. P. O., Farmington.

The undersigned hereby applies for membership in the NATIONAL LIVE STOCK INSURANCE ASSOCIATION and for insurance on Live Stock herein described for a period of one year, in accordance with the stipulations named on the back of the Policy issued by the Association, which are made a part hereof as fully and completely as if they were recited at length over the signatures hereto affixed.

1. Name of animal: Ithos. 2. Stallion. 3. What breed: Percheron. 4. Cash value: \$2800. 5. Amount of insurance: \$1000.00. 6. Premium: \$100.00. Give full description. 7. Age: 3. 8. Color: Brown. 9. Weight: 1920. 10. Height: 17 hand. 11. How marked: Irregular star. 12. If white on head, legs or feet, describe fully: ———. 13. Give register: No. 53347. 14. Registered in Am. Bree. & in Perch. Reg. Co. 15. When foaled: 1908. 16. From whom purchased: The A. C. Ruby Co. 17. Date: This. 18. Name of sire: Conde 59486. 19. Name of dam: Rustique 27557. 20. For what purpose will the animal be used: Breeding. 21. Is the animal mortgaged: ———. 22. If so, to whom: ———. 23. For what amount: ———. 24. If owned by a company, how many shares do you own: ———. 25. What was cost: ———. 26. Is the animal perfectly sound and in healthy condition: Yes. 27. Has it had colic or other sickness within six months: No. 28. If stallion, give number of mares served last season: No. and percentage with foal: ———. 29. Is the animal kind disposition or vicious: Kind. 30. Is there any contagious disease among stock in your territory: None. 31. Where is the animal stabled: Farmington. 32. Do you exercise daily: Yes. 33. In case of sickness or accident, do you agree to notify this Association at once, [152] giving full particulars and name of veterinary employed: Yes. 34. Have you had any other insurance on this animal: No. 35. If so in what company and what amount: ———. 36. Do you agree to properly feed, exercise, and in case of sick-

ness or accident to secure at once a veterinary if possible to do so: Yes. 37. Have you lost any animals by death during past year: No. If so, how many: None. From what causes (answer fully): ———. 38. To whom shall indemnity be paid in case of loss: Thomas S. Poindexter. P. O. Address, Farmington. Premium to be paid cash, \$100. Note, \$ ———. Total Premium, \$ ———.

I warrant the foregoing application to contain a full, true and correct description and statement of the conditions, situation and value of the property hereby proposed to be insured; and have answered all of the foregoing questions of my own knowledge, and that the policy to be issued thereon shall be based entirely upon the answers contained in this application, and that they are true to the best of my knowledge and belief, that I have in no wise misrepresented or concealed any fact concerning said stock. Failure to pay premiums, cash or notes, or any part thereof, when due shall suspend insurance policy until such time as it shall be reinstated, as provided in the stipulations printed in the policy issued by the Association. Application, if accepted by the Home Office, will be in full force from noon of the date of application.

No agent is authorized to change or modify the conditions of this application, or of the stipulations in the policy which may be issued thereon.

Dated this 17th day of Feb., 1911.

THOMAS S. POINDEXTER,

Applicant.

S. K. WATSON,

Witness.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [153]

[Plaintiffs' Exhibit "B"—Check.]

Portland, Oregon, June 27-11. No. 340.

HARTMAN & THOMPSON, BANKERS.

Pay to A. C. Ruby or order \$4219.00, Forty-two hundred nineteen & no/100 Dollars.

FLOY J. CAMPBELL.

Endorsed: A. C. Ruby.

Endorsed: PAID. Merchants' National Bank.

Leiter & Campbell

vs.

Poindexter.

Plaintiff's Exhibit "B."

V. A. Crum, Notary Public.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [154]

[Plaintiffs' Exhibit "C"—Check.]

Portland, Or., June 27th, 1911. No. 2249.

**THE UNITED STATES NATIONAL BANK OF
PORTLAND.**

Pay to the order of A. C. Ruby \$4219.00, Four Thousand Two Hundred and Nineteen 00/100.

J. M. LEITER.

Endorsed: A. C. Ruby.

Endorsed: Paid through Portland Clearing House, Merchants' National Bank, June 29, 1911.

Leiter & Campbell

vs.

Poindexter.

Plaintiff's Exhibit "C."

V. A. Crum, Notary Public.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [155]

[Plaintiffs' Exhibit "C-2"—Complaint.]

In the Circuit Court of the State of Oregon for Multnomah County.

HENRY STROH,

Plaintiff,

vs.

A. C. RUBY, S. K. WATSON, H. F. DEARDORFF, and THOMAS S. POINDEXTER,
Defendants.

Complaint.

Comes now the above-named plaintiff and charges and alleges the facts to be.

I.

That the plaintiff herein is a farmer living near Farmington in the State of Washington. That the defendants herein, to wit, A. C. Ruby and S. K. Watson and H. F. Deardorff are dealers in horses and all of them residents of Multnomah County, Oregon. That the defendant Thomas S. Poindexter is a resident of the State of Idaho, but whose place of business and post office address is the town of Farmington in the State of Washington.

II.

That heretofore, to wit, February 24th, 1911, the defendants A. C. Ruby, S. K. Watson and H. F. Deardorff hereinafter called said defendants, desired to sell and dispose of one certain imported Percheron stallion named Ithos, imported from France to the

United States in the year 1910, to wit, in February, 1911, said defendants took said horse to Farmington, Washington, for the purpose of selling the same.

III.

That said defendants entered into a conspiracy with the defendant Poindexter to sell this horse to the plaintiff herein and made arrangements with the said Poindexter to act as a [156] dummy by which said horse was to be sold to the plaintiff and the said Poindexter for breeding purposes, that being the only purpose and use they had for said horse, for the sum of \$2800.00. The said Poindexter was to ostensibly pay cash to said defendants in the sum of \$400, and the plaintiff was to give his note to A. C. Ruby Company (which company said plaintiff charges and alleges the fact to be on information and belief, consisted of A. C. Ruby, S. K. Watson and H. F. Deardorff, or one or more of said defendants) for the sum of Twenty-four Hundred Dollars (2400.00), which said note as plaintiff now recollects is payable in installments of Eight Hundred Dollars (\$800.00) per year with interest.

IV.

That said defendants represented that said horse was sound in all respects and of the full value of Twenty-eight hundred Dollars (\$2800.00). That said horse had no defects and that he was in every way suitable as a horse for breeding purposes, and this plaintiff, relying upon the representation of said defendants and believing that the defendant Poindexter was an actual and *bona fide* purchaser of a share in said horse, agreed with said defendants to

purchase said horse in connection with said Poindexter for the sum of Twenty-eight Hundred Dollars (\$2800), the defendant Poindexter paying Four Hundred Dollars (\$400.00) in cash and this plaintiff issuing his promissory note to A. C. Ruby Company for Twenty-four Hundred Dollars (\$2400.00), payable in installments of \$800.00 Eight Hundred Dollars per year with interest thereon.

That thereupon said defendants delivered to the said plaintiff and said Poindexter the horse and issued a contract, a copy of which is hereto attached and marked Exhibit "A" and made a part hereof and said plaintiff executed and delivered to said A. C. Ruby Company, his promissory note for Twenty-four Hundred Dollars (\$2400.00) as herein stated.
[157]

V.

That plaintiff further alleges that said horse was not a sound and perfect horse as represented by said defendants, and that said defendants entered into a scheme with the defendant Poindexter and used the said Poindexter as a dummy to effect the sale of said horse to this plaintiff. That said Poindexter did not pay said defendants or any of them (\$400.00) Four Hundred Dollars, or any sum or amount. That said horse was not a *perfect*; that said horse was not a sound horse; that said horse was, in fact, what is known as wind-broken. That said horse was represented to this plaintiff by said defendants to be a horse suitable and fit in every respect for breeding purposes. That in truth and in fact said horse is not fit for breeding purposes, and was not fit, at the time

of said sale, for breeding purposes, but was wind-broken and wholly unfit for breeding purposes. All of which was unknown to plaintiff till long after said sale.

VI.

This plaintiff charges and alleges the fact to be, that said defendants knew that said horse was not fit for breeding purposes and knew that he was diseased and wind-broken, and knew that said horse was practically of no value.

VII.

And this plaintiff charges and alleges the facts to be that said horse is and was at the time of said sale of no value for breeding purposes or otherwise, and that among other things in said contract of purchase it is provided that if the above-named stallion did not give satisfaction in every way that said defendants agreed to furnish another stallion of the same price and quality, upon delivery of the above-named stallion in as good and sound condition * * * to our barns in Portland, Oregon. [158]

VIII.

The plaintiff alleges that he is a German and does not understand the English language very well, and did not understand the full import of the writing given him as above stated, but relied upon the statements of said defendants that said horse was sound and relying thereon executed his note to A. C. Ruby Company as hereinbefore stated.

IX.

That after this plaintiff discovered that said horse was wind-broken and wholly unfit for breeding pur-

poses, he notified the said A. C. Ruby Company that said horse was valueless and in order to comply with what he, after said sale and discovery of the above facts, was advised and understood as the terms of said contract in the above transaction, this plaintiff shipped said horse to Portland, Oregon, from Farmington, Washington, in July, 1911, and to wit, July 15th, 1911, and to wit, again on July 17th, 1911, made a tender of this horse to the A. C. Ruby Company and especially to the above defendants Watson and Deardorff, and demanded from said defendants another horse or stallion of the same price and quality, and especially requested that said defendants take possession of said horse.

That said defendants refused to take possession of the horse in any respect and refused to receive same and deliver this plaintiff another horse of like price and quality, and refused to deliver to plaintiff his note given for said horse, but in furtherance of said defendant's conspiracy to cheat, rob and bilk the plaintiff, undertook to deliver to the plaintiff another horse that was of little or no value, to wit, not exceeding in value Six Hundred (\$600.00) to Eight Hundred (\$800.00) Dollars.

X.

Plaintiff further charges and alleges the facts to be that said defendants in making said sale to this plaintiff of said horse, conspiring and confederating together to work upon [159] this plaintiff a confidence game and to sell him the horse above stated for the sum of Twenty-four Hundred Dollars (\$2400.00), and in order to carry out their bilking

scheme and confidence game as to this plaintiff, used the defendant Poindexter as a dummy and under said arrangement and agreement the said Poindexter was to pretend to purchase an interest, to wit, the amount of Four Hundred Dollars (\$400.00) in said horse, and was to and did pretend to pay cash therefor, but in truth and in fact the said Poindexter did not pay Four Hundred Dollars (\$400.00) or any sum or amount to the said defendants or A. C. Ruby Company at all, but merely loaned himself to said defendants in order to carry out said defendants' confidence game and scheme to sell to this plaintiff said horse for the sum of Twenty-four Hundred Dollars (\$240.00), and to cheat, and defraud this plaintiff by selling him a horse that by reason of the fact that said horse was wind-broken and diseased, was wholly unfit for breeding or other purposes.

That if said horse had been perfectly sound and what said defendants represented said horse to be, that he would have been valuable to this plaintiff for breeding purposes of the reasonable value of Twenty-four Hundred Dollars (\$2400.00).

XI.

Plaintiff further charges and alleges the fact to be that he is advised and believes and upon information and belief so states, to wit, that the said defendants A. C. Ruby Company have negotiated or are about to negotiate the promissory note made and executed by this plaintiff to the said A. C. Ruby Company, for the purpose and with the intent of preventing this plaintiff from having any legal defense thereto, for the reason that same will be represented by a *bona*

fide purchaser in due course, and the plaintiff will be compelled to pay the same. [160]

XII.

Plaintiff further charges and alleges the fact to be that as nearly as this plaintiff can recollect said promissory note is negotiable in form, and for that reason this plaintiff would have no defense against said note in the hands of an innocent purchaser for value in due course. That unless said defendants are enjoined from transferring or negotiating said note, the said A. C. Ruby Company will negotiate same.

XIII.

That said plaintiff brought the said horse to Portland, Oregon, from Farmington, Washington, a distance of some six or seven hundred miles, in July, as herein stated, and that said horse is now in Portland, Oregon, and the said defendants refused to accept said horse and that this plaintiff is required to keep said horse, to wit, at a great expense of Seventy-five cents (\$.75) per day. That said plaintiff also as soon as he became the purchaser of said horse, to wit, on February 24th, 1911, caused said horse to be insured in the National Live Stock Insurance Association of Portland, Oregon, against death by disease, etc., for the sum of \$1000.00 One Thousand Dollars, for one year, and paid the premium thereon of, to wit, the sum of One Hundred Dollars (\$100) or ten per cent of the amount of the insurance.

XIV.

That at the time this plaintiff purchased said horse as above stated, said defendants represented to him that he might return said horse at any time, if he did

not prove satisfactory to him, and that this plaintiff relied upon said representation. That all the representations made to this plaintiff by said defendants were made as a result of a conspiracy between the said defendants and the said defendant Poindexter for the purpose of securing from this plaintiff his promissory note for the purchase price of said horse and for the purpose of cheating, defrauding and robbing this plaintiff by a confidence game and scheme by said defendants in [161] order to secure from said plaintiff his promissory note for the sum of Twenty-four Hundred Dollars (\$2400.00), and to cheat, defraud and rob this plaintiff of said sum; and all of said representations were false and were made with the intent and purpose and to the end that said plaintiff would give his promissory note for said horse to A. C. Ruby Company for Twenty-four Hundred Dollars (\$2400.00), and that the said defendants would thereby cheat, defraud, rob and steal from this plaintiff the said sum of Twenty-four Hundred Dollars (\$2400.00), and as a false token delivered to said plaintiff said diseased, wind-broken and worthless stallion, which said defendants knew to be wind-broken and worthless and by said confidence game to rob this plaintiff to the extent of his said promissory note, to wit, the sum of Twenty-four Hundred Dollars (\$2400.00), with interest thereon.

XV.

Plaintiff further charges and alleges the fact to be that he has been put to great expense in taking care of said worthless horse since he purchased same, and that said expense is of the reasonable price of Eight

Dollars per month; that in addition thereto he was compelled and did ship said horse from Farmington, Washington, to the city of Portland at an expense of Forty and 50/100 Dollars, and that he has been put to a great expense in taking care of said horse since said time in the sum of Forty Dollars, and in addition thereto the plaintiff has been put to the present expense in connection with said transaction in the sum of One Hundred Dollars.

XVI.

Plaintiff further charges and alleges the fact to be that said expenses will continue, to wit, the expense of taking care of said horse and of carrying on this litigation, and asks the Court to appoint a receiver to take charge of said horse until this litigation can be ended, and also that the defendants be enjoined in this suit from negotiating said plaintiff's note for Twenty-four [162] Hundred Dollars.

WHEREFORE, plaintiff prays: First, that a receiver be appointed to take charge of the horse herein until the further order of this Court.

Second: That the defendants be enjoined from negotiating plaintiff's said note for Twenty-four Hundred Dollars (\$2400.00).

Third: That these defendants be required to deliver up to this plaintiff, for cancellation, his note for Twenty-four Hundred Dollars (\$2400.00), and required by order of this Court to accept and take back this horse so fraudulently sold to this plaintiff by these defendants.

Fourth: That in case said defendants have negotiated said note of said plaintiff's and are unable to

deliver the same, that the plaintiff have judgment and a decree against said defendants for the sum of Twenty-four Hundred Dollars (\$2400.00) and interest thereon, and for the further sum of his costs and expenditures and disbursements hereinbefore set forth, and that in any event said plaintiff recover from said defendants the amount expended for keeping said horse since the purchase thereof, to wit, since February 24th, 1911, and the further sum of his costs and expenses in shipping said horse to Portland, Oregon, and in taking care of said horse since that time in *the of*, to wit, ——— Dollars, and in the further sum of his present expenses in retaining said horse, to wit, the sum of ——— dollars, and that said plaintiff have such other and further and different relief as may seem to the Court meet and just in the premises, and that said plaintiff recover from the defendants herein his costs and disbursements in this suit.

THOS. O. DAY and

SAMUEL OLSON,

J. M. HADDOCK,

Attorneys for the Plaintiff. [163]

EXHIBIT "A."

THE A. C. RUBY CO.

IMPORTERS AND BREEDERS OF
PERCHERON, BELGIAN, SHIRE & GERMAN
COACH STALLIONS.

900 Sandy Road, Portland, Oregon.

References:

American National Bank, Pendleton, Oregon.

Merchants National Bank, Portland, Oregon.

Portland, Oregon, Feb. 14, 1911.

KNOW ALL MEN BY THESE PRESENTS,
That we have this day sold the Imported Percheron
Stallion named Ithos No. 53347 (83515) to the Fol-
lowing Persons:

Here insert all the names of the Purchasers.

.....
.....
Thos. S. Poindexter P. O. Farmington Wn.
Henry Stroh P. O. " "
.....P. O.....
.....P. O.....
.....
.....

PURCHASE PRICE, Twenty Eight Hundred
(2800) Dollars.

GUARANTEE—If the above-named stallion does
not give satisfaction in every way and get sixty per
cent of the producing mares, that are properly bred
and returned for second trial at the end of the third

week, in foal, during the breeding season, commencing April 1st and ending August 1st, we agree to furnish another stallion of the same price and quality upon delivery of the above-named stallion in as good and sound condition at the end of the first year as he is at present, to our barns in Portland, Oregon. If the stallion above named should not be a breeder or should not be true to pedigree furnished, we agree to furnish another stallion [164] of the same price and quality, upon delivery of the above named stallion in as good and sound condition as he is at present, at our barns in Portland, Oregon, and in consideration thereof the undersigned purchasers hereby waive any and all damages, or rights of action for damages, created by statute or otherwise, that they or either of them might have by reason of the failure of said stallion to be a breeder or true to pedigree. Should the above named stallion not fulfill this guarantee, we will gladly replace him according to the terms of this contract, but will not be liable for any damages or offsets that might be claimed by purchasers, or any verbal or written contracts or changes made by agents. And the undersigned purchasers hereby acknowledge that they have read this contract and that no representations of guarantees were made to them, as an inducement to purchase said stallion, or otherwise; except those contained in this instrument, and it is understood that The A. C. Ruby Company is not to be held liable upon any other warranty or representation except those contained in this instrument.

In the case of the above-named stallion's death or

any ailment that would render him unfit for services within four years from date we agree to furnish another stallion of the same price and quality, providing the purchasers keep said stallion insured in some reliable insurance company for \$1000 and collect said insurance and turn over the same to The A. C. Ruby Co., upon delivery of horse. In case of the death of said stallion, as aforesaid, the undersigned purchasers are to turn over said insurance money to The A. C. Ruby Co., as soon thereafter as they are notified to select another horse, and on failure so to do it shall be conclusively presumed that they do not want another horse, and that they have elected to keep the insurance money in lieu thereof.

A. C. RUBY CO.

By A. C. RUBY.

Signature of Purchasers:

Accepted by: THOS. S. POINDEXTER.
HENRY STROH.

Address.

Farmington, Wn.
" " [165]

State of Washington,
County of Whitman,—ss.

I, Henry Stroh, being first duly sworn, depose and say that I am the plaintiff in the above-entitled suit, and that the foregoing complaint is true as I verily believe.

HENRY STROH.

Subscribed and sworn to before me this 29th day of July, 1911.

[Notarial Seal]

W. W. RENFREW,
Notary Public for the State of Wash.

[Endorsed]: Filed Aug. 24, 1911. F. S. Fields,
Clerk. By R. A. Reid, Deputy. [166]

State of Oregon,

County of Multnomah,—ss.

I, F. S. Fields, Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, do hereby certify that the foregoing copy of Complaint has been compared by me with the original and that it is a correct transcript therefrom and of the whole of such original Complaint as the same appear on file in my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 2d day of Nov., A. D. 1912.

[Seal]

F. S. FIELDS,
Clerk of the Circuit Court.

State of Oregon,

County of Multnomah,—ss.

I, Robert G. Morrow, Judge presiding in Department No. Two of the Circuit Court of the State of Oregon, for the County of Multnomah, do hereby certify that F. S. Fields is the duly elected, qualified and acting Clerk of the above-entitled court, and that his certificate hereto attached is in due form and by the proper officer.

ROBERT G. MORROW,
Judge.

State of Oregon,

County of Multnomah,—ss.

I, F. S. Fields, Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, do hereby certify that the Hon. Robert G. Morrow is the

duly elected, qualified and presiding Judge of Department No. Two of the above-entitled court, presiding [167] at the regular term of said court.

IN WITNESS WHEREOF, I hereby set my hand and affix the seal of said court, this 2d day of November, A. D. 1912.

[Seal]

F. S. FIELDS,
Clerk of Circuit Court.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [168]

[Plaintiffs' Exhibit "D"—Postal Card.]

In Evidence Plaintiffs' Ex. "D." Nov. 11, 1912.

H. P. Cummock.

POSTAL CARD.

(Address) Mr. S. K. Watson,

Garfield,

Wash.

Farmington, Wash. 2-25.

Mr. S. K. Watson,

Dear Sir:—

Send Stroh's note here to me or to the bank and he will pay it the Ins. note I will also write to Ruby & Co., at Portland as I don't know where you are for sure, horse is fine, yours truly,

THOS. S. POINDEXTER,

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [169]

[Plaintiffs' Exhibit "E"—Postal Card.]

Plaintiffs' Ex. E.—16. In Evidence Nov. 11, 1912.

H. P. Cummock.

POSTAL CARD.

Address:

A. C. Ruby & Co., Portland, Oregon.

Farmington, Wash. 3-6-11.

A. C. Ruby & Co., Portland.

Dear Sir:

I written to you about a week ago in regard to a note given Mr. Watson when here by Henry Stroh for Ins. on that Percheron Colt we bought he wants to take up the note so please send it here for collection or let me hear from you at once.

Yours truly,

T. S. POINDEXTER,

Sec.

No. 525. Nov. 12, 1912.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [170]

[Plaintiffs' Exhibit "F"—Receipt.]

In Evidence, Plaintiffs' Exhibit "F." Nov. 11, 1912.

May 15, 1913. H. P. Cummock.

Farmington, Wash. 2/17th, 1911.

This is to certify that we the undersigned have received from S. K. Watson for the A. C. Ruby Co. the Percheron Stallion Ithos No. 53344 (No. 83515) in

good condition satisfactory and *evry* as represented by S. K. Watson in the sale of said Stallion.

[Seal] THOS. S. POINDEXTER.

[Seal] HENRY STROH.

Witness:

W. W. THERSTEN.

[Endorsed]: No. 525. Filed May 15, 1913. A. L. Richardson, Clerk. [171]

[Plaintiffs' Exhibit "G."]

In Evidence, Plaintiffs' Exhibit "G." Nov. 11, 1912.

H. P. Cummock.

THE A. C. RUBY CO.

Importers and Breeders of Percheron, Shire & German Coach Stallions.

900 Sandy Road, Portland, Oregon.

References:

American National Bank, Pendleton, Oregon.

Merchants National Bank, Portland, Oregon.

Portland, Oregon, February 14, 1911.

KNOW ALL MEN BY THESE PRESENTS:

That we have this day sold the Imported Percheron Stallion named Ithos, No. 53347 (83515) to the following persons:

Here insert the names of the purchasers:

Thos. S. Poindexter. P. O. Farmington, Wash.

Henry Stroh. " " "

PURCHASE PRICE, Twenty Eight hundred no/100 \$2800.00 Dollars.

GUARANTEE—If the above named stallion does not give satisfaction in *every* and get sixty per cent of the producing mares, that are properly bred and

returned for second trial at the end of the third week, in foal, during the breeding season, commencing April 1st and ending August 1st, we agree to furnish another stallion of the same price and quality upon delivery of the above named stallion in as good and sound condition at the end of the first year as he is at present, to our barns in Portland, Oregon. If the stallion above named should not be a breeder or should not be true to pedigree furnished we agree to furnish another stallion of the same price and quality, upon delivery of the above named stallion in Portland, Oregon, and in consideration thereof the undersigned purchasers hereby waive any and all damages, or rights of action for damages, created by statute or otherwise, that they or either of them might have by reason of the failure of said stallion to be a breeder of true to pedigree. Should the above named stallion [172] not fulfill this guarantee, we will gladly replace him according to the terms of this contract, but will not be liable for any damages or offsets that might be claimed by the purchasers, or any verbal or written contracts made by agents. And the undersigned purchasers hereby acknowledge that they have read this contract and that no representations or guaranties were made to them as an inducement to purchase said stallion, or otherwise; except those contained in this instrument, and it is understood that the A. C. Ruby Co., is not to be held liable upon any other warranty or representation except those contained in this instrument.

In case of the above named stallion's death, or any ailment that would render him unfit for services with-

in four years from date we agree to furnish another stallion of the same price and quality, providing the purchasers keep said stallion insured in some reliable insurance company for \$1000 and collect said insurance and turn the same over to the A. C. Ruby Co., upon delivery of horse. In case of the death of said stallion, as aforesaid, the undersigned purchasers are to turn over said insurance money to The A. C. Ruby Co., as soon thereafter as they are notified to select another horse, and on failure so to do it shall be conclusively presumed that they do not want another horse, and that they have elected to keep the insurance money in lieu thereof.

THE A. C. RUBY CO.

By A. C. RUBY.

(Signature of Purchasers:)

THOS. S. POINDEXTER, 1 share
HENRY STROH, 6 shares.

(Address)

Farmington, Wash.
" "

[Endorsed]: No. 525. Nov. 12, 1912. Filed May 15, 1913. A. L. Richardson, Clerk. [173]

[Plaintiffs' Exhibit "H"—Affidavit.]

State of Washington,

County of Whitman,—ss.

AFFIDAVIT.

Before me personally appeared C. F. Monroe, who being first duly sworn, on oath says: That the attached license certificate is a true copy of the original license certificate No. 127 issued to Stroh & Poindexter of Farmington as shown by the office records

of the Dept. of Animal Husbandry of Washington State College.

C. F. MONROE,
Asst. Animal Husbandman.

Subscribed and sworn to before me this 6th day of November, 1912.

WM. C. KRUEGEL,
Notary Public. [174]

[Plaintiffs' Exhibit "O"—Certificate.]

(Copy)

THE STATE COLLEGE OF WASHINGTON.

Department of Animal Husbandry.

CERTIFICATE OF PURE BRED STALLION.

No. 127.

Chapter 99, Laws of Washington, 1911.

The pedigree of the stallion Ithos No. 53347 (83515)

American Foreign

Owned by Stroh & Poindexter.

P. O. Farmington, R. F. D. County,
Whitman.

Described as

Certificate sound by B. F. Price.

Breed, Percheron. Color, Bay. Marks, Irregular
Star.

..... Foaled in the year 1908, April 19; has been
examined at the State College, and it is hereby
certified that the said stallion is of pure breed-
ing and is registered in a stud book recognized

by the Department of Agriculture, Washington,
D. C.

W. T. McDONALD,
Professor of Animal Husbandry.

[Seal]

Per C. F. MONROE.

Dated at Pullman this 19th day of June, 1911.

Note: This certificate must be recorded with the Auditor of the County in which the stallion is to be used, and must be renewed in June, 1913.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [175]

[Plaintiffs' Exhibit "I"—Stipulation.]

It is hereby stipulated and agreed by and between Henry Stroh and Thos. S. Poindexter as follows, to wit:

The parties hereto purchase a horse from A. C. Ruby Company which they claim is wind broken and of no value. This purchase was made, to wit: February 14, 1911, for Twenty-eight Hundred Dollars (\$2800.00) for which a note was given on which there is endorsed a payment of Four Hundred Dollars (\$400.00), to wit: February 17, 1911. This horse is now in Portland, and;

WHEREAS action has been brought by the assignee of A. C. Ruby Company against Thos. S. Poindexter in the Circuit Court of the United States for the Northern District of Idaho upon the note alleged to have been signed by both parties hereto and now it is desired that the parties hereto settle the matter in the following manner; that is to say the above-named Henry Stroh hereby turns over to the above named Thos. S. Poindexter the horse and

all interest in the same that he has in every way, upon condition that the said Thos. S. Poindexter makes a satisfactory settlement with the assignees of the A. C. Ruby Company, or with A. C. Ruby Company, so that said note shall be paid and discharged and all liability of the said Henry Stroh thereon extinguished and that in consideration that the said Poindexter shall so settle and discharge said note, the above Henry Stroh hereby assigns to the said Poindexter all right, title and interest in said horse and also hereby agrees to dismiss certain suit that he has pending in Multnomah County, Oregon, against A. C. Ruby, et al., and also agrees to acquit A. C. Ruby from any cost, expense or damage by reason of the sale of said horse or otherwise in all and every respect. Whereupon it is hereby agreed that the said Poindexter shall settle and discharge the note above referred to and hold the said Henry Stroh harmless from any liability therein and Henry Stroh on his [176] behalf hereby transfers and assigns to the said Poindexter all right, title and interest in the above named horse and also hereby agrees to immediately, as soon as said liability is settled, to dismiss his suit against A. C. Ruby Company and to acquit said A. C. Ruby Company from each and every transaction referred to herein and also acquit the said Poindexter from any liability, any cost or expense in connection with the transaction herein referred to.

This contract made and signed in duplicate at Portland, Oregon, this 6th day of January, 1912.

HENRY STROH.

THOS. S. POINDEXTER.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [177]

[Plaintiffs' Exhibit "K"—Letter.]

In Evidence, Plaintiffs' Ex. "K," 16. Nov. 11, 1912.

H. P. C.

Portland, Oregon, Jan. 25, 1912.

Mr. Thos. S. Poindexter,

Farmington, Wash.

Dear Sir:—

My new shipment of horses are now at home and getting in good shape. Come down and make your selection according to agreement. I have some of the best horses in this lot that I have ever imported. Of course they dont look as well now as they will in a short time, as they were 27 days in transit. The sooner you come, the more you will have to select from. I will be away the first week in February. You had better let me know when you are coming.

Respectfully yours,

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [178]

[Plaintiffs' Exhibit "M"—Letter.]

Plaintiffs' Exhibit "M." Nov. 11, 1912. May 15, 1913. H. P. C.

HOTEL FARMINGTON,

W. D. Haynes, Proprietor.

Farmington, Washington, Sept. 4th, 1911.

Mr. J. M. Leiter,

Dear Sir:—

I received a notice from you to settle some interest on a note given to A. C. Ruby & Co. Portland, signed by me and Henry Stroh. Now I paid no at-

tention to it as I did not owe the Co. anything, now then since then that note has been sent here for the interest which I refused to pay. Now I just thought I would explain the matter a little to you and you could do as you please A. C. Ruby's man Watson came here with a horse to sell and offered several men here to help him sell the horse and he would give them one share the horse to sell at \$2800 dollars or \$400 per share so he made the sale of the horse of 6 shares to Henry Stroh and told me that Stroh gave him as security a note and mortgage on a ranch so all the paper that I signed was just the contract and their agreement which was necessary to accept the horse but never signed any note at all. So if he has my name on a note it is forged there by this man Watson or their Co. because I never saw such a note before until it came here for collection.

T. S. POINDEXTER.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [179]

[**Plaintiffs' Exhibit "P"—Day-Letter (Telegram).**]

Plaintiffs' Ex. "P." In Evidence Nov. 12/12. H.

P. C. May 15, 1913.

Day Letter. The Western Union Telegraph Company.

Received at 76 Third St., Cor. Oak, Portland, Ore.

74 UN. HW. 48 Blue 749.

MP, New York, Jan. 5, 1912.

Wilson and Neal,

Room 631, Chamber of Commerce, Portland,
Oregon.

I will give them any horse they want will guar-

antee satisfaction I would not pay any costs or expense and would want everything cleared up and cash or notes secured will hardly be home before eleventh if not settlement made you should get service on them in Portland.

A. C. RUBY.

6:14 PM.

No. 525 Nov. 12, 1912.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [180]

[Plaintiffs' Exhibit "R"—Letter.]

GEORGE ROSSMAN.

A. KING WILSON ('92)
Commercial and Corporation Law,
Irrigation, Use of Streets.

O. A. NEAL ('99)
Mining Law, Real Estate Bank-
ruptcy and Estates.

Law of Insurance and Carriers.

WILSON & NEAL,

Attorneys at Law.

630-632 Chamber of Commerce.

Both Phones, A—1370, Main 1370

Portland, Oregon, Jany. 7, 12.

Messrs. Forney & Moore,

Moscow, Idaho.

Gentlemen:—

Your telegram received; have agreed with Poin-
dexter that if he will pay over to you the sum of
\$2722.25 the case may be dismissed and settled. Of
this amount you are to deduct your fee \$50.00 and
the court costs that have been incurred. We have
advised our attorneys in case pending in Spokane to
hold case there in abeyance until they hear from us
further. And as soon as we hear from that case has
been settled we will dismiss the case there. Mr.

Poindexter is leaving for home today and will no doubt see you in a few days. If you still have the note, and he settles up deliver it to him; if you have already returned it to us we will forward it to him as soon as case is settled. We remain,

Yours truly,

WILSON & NEAL.

By O. A. NEAL.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [181]

[Plaintiffs' Exhibit "W"—Summons.]

*In the Circuit Court of the United States for the
District of Idaho, Central Division.*

No. 525.

J. M. LEITER and FLOYD J. CAMPBELL,

vs.

THOS. S. POINDEXTER.

Summons.

The President of the United States to Thos. S. Poindexter the Above-named Defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Moscow in said district, and answer the complaint filed against you in the above-entitled action within twenty days from the date of the service of this Summons upon you, if served within the Central Division of said district, or if served within any other division of said district, then within forty days from the date of such service upon you; and if you fail so to appear and

answer, for want thereof, the plaintiffs will apply to the Court for the relief demanded in the complaint, to-wit:

Judgment against the defendant for the sum of \$2400.00 with interest thereon from February 14, 1911, at eight per cent per annum until paid, and for the sum of \$350.00 attorneys' fees herein and for the costs and disbursements in this action. The facts more fully appearing in plaintiffs' complaint, a certified copy of which is attached hereto and made a part hereof.

And this is to COMMAND you the MARSHAL of said district, or your DEPUTY, to make due service and return of this Summons. Hereof fail not.
[182]

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, affixed at Boise, in said District this 20th day of December, 1911.

A. L. RICHARDSON,
Clerk.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [183]

**[Defendant's Exhibit No. 1 for Identification—
Certificate of Stock.]**

Capital Stock \$2800.00 Number of Shares—7

CERTIFICATE OF STOCK.

This is to certify, that we have sold to Mr. Thomas Poindexter, one shares of stock valued at \$400.00 paid in full per share, in the Imported Percheron Stallion named Ithos, No. 53347 (83515).

Dated at Farmington, State of Wash. this 13th day of Feb. 1911.

THE A. C. RUBY CO.

By S. K. WATSON, Agent.

Portland, Oregon.

[Endorsed]: Filed May 15, 1913. A. L. Richardson, Clerk. [184]

[Plaintiffs' Exhibit 2—Day-Letter (Telegram).]
DAY LETTER.

The Western Union Telegraph Company.
Received at 76 Third St., Cor. Oak, Portland, Ore.
S 178 EA. 30 Collect Blue.

Moscow, Idaho, 8. Jan. 8, 1912, 11 A. M.
Wilson & Neal,
Chamber of Commerce,
Portland, Ore.

Can't fix fees no bills Clerk or Marshal both Boise,
Estimated twenty five dollars fee if defendant pays
fifty dollars, of client whatever you think reasonable.
Letter mailed today.

FORNEY & MOORE.

Plaintiffs' Exhibit 2. Nov. 12, 12 H. P. C.

[Endorsed]: No. 525. Nov. 12, 1912. Filed May 15, 1913. A. L. Richardson, Clerk.

Order Settling and Allowing Bill of Exceptions.

The foregoing is this day duly settled and allowed
as the plaintiffs' bill of exceptions.

October 3d, 1913.

FRANK S. DIETRICH,
Judge. [185]

**[Stipulation for Allowance of Bill of Exceptions,
etc.]**

IT IS STIPULATED by the attorneys for the re-

spective parties hereto, that the foregoing BILL OF EXCEPTIONS is true and correct and that the same may be allowed by the Court and made a record in this cause.

WILSON & NEAL,
FORNEY & MOORE,
Attorneys for Plaintiffs.

Attorneys for Defendants.

Service of a copy accepted this 4th day of September, 1913.

C. J. ORLAND,
Attorney for Defendant.

[Endorsed]: Delivered and received for filing this 3d day of September, A. D. 1913. A. L. Richardson, Clerk. By M. W. Griffith, Deputy. Refiled Oct. 3, 1913. A. L. Richardson, Clerk. [186]

*In the District Court of the United States Within
and for the District of Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOMAS S. POINDEXTER,
Defendant,

**Petition for Writ of Error and Order Allowing
Same.**

The above-named plaintiffs conceiving themselves aggrieved by the decision and judgment of the Court, made and entered herein on the — day of May, A. D. 1913, in the above-entitled cause, do hereby pray for a Writ of Error from said decision and judgment,

to the United States Court of Appeals, in and for the Ninth Judicial Circuit of the United States, and pray that a writ of error may be allowed and that a transcript and record of the proceedings, upon which said decision and judgment were rendered, duly authenticated, may be sent to the said Court of Appeals.

J. H. FORNEY.

FORNEY & MOORE,

WILSON & NEAL.

AND NOW, to wit, on this 18th day of October, A. D. 1913, it is ordered that the foregoing petition and writ be allowed, as prayed for, upon said plaintiffs giving bond for the sum of Three Hundred (\$300.00) Dollars.

FRANK S. DIETRICH,

United States District Judge for the District of Idaho.

[Endorsed]: Filed Oct. 18, 1913. A. L. Richardson, Clerk. [187]

*In the District Court of the United States Within
and for the District of Idaho, Central Division.*

AT LAW—NO. ———.

J. M. LEITER and FLOYD J. CAMPBELL,

Plaintiffs,

vs.

THOMAS S. POINDEXTER,

Defendant,

Assignment of Error.

Now comes J. M. Leiter and Floyd J. Campbell, plaintiffs in error in the above numbered and entitled cause, and in connection with their petition

for a writ of error in this cause assign the following errors which plaintiffs in error aver occurred on the trial thereof, and upon which they rely to reverse the judgment entered herein as appears of record:

First: The Court erred in refusing to permit the plaintiffs to offer in evidence and read to the jury the depositions of J. M. Leiter and Floyd J. Campbell, plaintiffs, and of the witness A. C. Ruby, tending to show that the plaintiffs were *bona fide* holders of the note for value and that they took it before it became due without notice of any defenses thereto.

Second: The Court erred in instructing the jury that the instrument sued upon in this cause, reading as follows:

“STOCKHOLDERS’ PURCHASING CONTRACT.

Feb. 14th, 1911.

After a good and satisfactory examination of the percheron Stallion named Ithos No. 53347 owned by the A. C. Ruby Co. of Portland, Ore., and recognizing his value as a means of improving our horse stock, we, the undersigned subscribers, hereby purchase said Stallion of the A. C. Ruby Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

\$2800.00 Portland, Oregon, Feb. 14th, 1911.

For value received I promise to pay to the order of The A. C. Ruby Co., the sum of Twenty Eight Hundred Dollars, payable at the Merchants National Bank, Portland, Oregon, in payments as follows:

[188]

One Thousand and no 00 Dollars. . Oct. 1st, 1911.

Nine Hundred and no 00 Dollars. . Oct. 1st, 1912.

Nine Hundred and no 00 Dollars. . Oct. 1st, 1913.

with interest from date at the rate of eight per cent payable semi-annually, and if not so paid, the whole sum of both principal and interest to become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay reasonable attorneys fees.

THOS. S. POINDEXTER,
HENRY STROH."

was not a negotiable promissory note.

Third: The Court erred in instructing the jury as shown by the instructions given by the Court, for the reason that said instructions took from the jury the question whether the plaintiffs were *bona fide* holders of the note sued upon, and informed the jury that the plaintiffs were not *bona fide* holders thereof.

Fourth: The Court erred in refusing to give the following instruction No. 1, requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

"A negotiable instrument is a contract in writing whereby one or more persons promise to pay to the order of one or several persons a definite sum, at a future time named in the instrument, and, under this rule the note sued on in this action is a negotiable promissory note, and you should so regard it."

Fifth: The Court erred in refusing to give the following instruction No. 2, requested by the plaintiffs, for the reason that the said instruction is not em-

braced within the instructions of the Court, and is further based upon the facts in the case, namely:

“A holder in due course is one who, for a valuable consideration, before maturity, takes such an instrument under the following conditions:

1. It must be complete and regular upon its face, and I instruct you that this note is such an instrument.

2nd. He must have become the holder before the note was overdue, and, if you find the plaintiffs are such holders, they did become such before it was overdue.

3rd. They must have taken it in good faith, and for value, as to this, if the plaintiffs had no notice that the defendant claimed fraud in the execution of the note, before they took the note from the A. C. Ruby Company, it would make no defense that you may find, as a matter of fact, that there was fraud in the securing of the note from the defendant by The A. C. Ruby Company or its agents. Under such circumstances, plaintiffs would take the note as holders in due course. If you find that the plaintiffs are the holders of the said note in due course, then the fact that the defendant may [189] have been induced to sign the note, through the misrepresentations he has testified to, would not discharge him from liability on the note as against the plaintiffs here, for, if the defendant had an opportunity to read the note, and failed in that regard, if he failed to investigate—to observe—to ascertain what the instrument was, in the hands of the plaintiffs, if you find that plaintiffs are holders in due

course, for value, defendant cannot be held to defend against it.

4. At the time the note was negotiable, plaintiffs must have had no notice of any infirmity in this note. If you find that the plaintiffs are such holders of the note, then the fact that the defendant might have been induced to sign the note, through the misrepresentations he has testified to, would not discharge him from liability as against plaintiffs."

Sixth: The Court erred in refusing to give the following Instruction No. 3, requested by plaintiffs, for the reason that the said instruction is not embraced within the Instructions of the Court, and is further based upon the facts in the case, viz.:

"One who takes negotiable paper, before maturity, for value, is entitled to recover against the maker, unless it is shown that, in the transaction by which title was acquired, the endorsee had knowledge of facts which would render the same invalid against the maker, or was guilty of bad faith, and the burden of proving such knowledge or bad faith is upon the defendant."

Seventh: The Court erred in refusing to give the following Instruction No. 4, requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court and is further based upon the facts in the case, viz.:

"The title to a negotiable promissory note passes by endorsement, and one who takes a negotiable promissory note by endorsement, before maturity, for a valuable consideration, in the regular course of business, without notice of infirmities, is called a

holder in due course, and is entitled to collect it of the maker, even though the maker might have a good and valid defense against the original payee of the note."

Eighth: The Court erred in refusing to give the following Instruction No. 5, requested by the plaintiffs, for the reason that said instruction is not embraced within the Instructions of the Court, and is further based upon the facts in the case, viz.:

"If you find from the evidence that when Campbell and Leiter received the note made by the defendant, a copy of which is set forth in the complaint herein, in favor of the A. C. Ruby Company, they knew of nothing to apprise them, or put them upon inquiry with respect to the claim now made by the defendant that said note was given without consideration, or procured by fraud, your verdict should be for the plaintiffs for the full amount sued for."

[190]

Ninth: The Court erred in refusing to give the following Instruction No. 6, requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

"As to what notice of the infirmity of the note the plaintiffs should have had, I charge you that they must have had actual notice of some defect in the instrument. It is not sufficient to defeat their claim that they are holders in due course to show simply suspicious circumstances. You must be able to find from the evidence that plaintiffs did know—had actual notice—of the fraud claimed before you can

consider the defense which the defendant imposes regarding the fraudulent character of the transaction by which the defendant claims he was induced to sign the note.”

Tenth: The Court erred in refusing to give the following instruction No. 7, requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

“I instruct you that nothing contained in the note itself would in any way be notice to plaintiffs of any infirmity in the note.”

Eleventh: The Court erred in refusing to give the following Instruction No. 8, requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

“It is the part of ordinary prudence for one who is asked to sign a contract, or obligation relating to business matters of importance, to investigate, and failure to do so, to read when opportunity is given to read, to look when opportunity is afforded to look, to examine when the instrument is submitted for examination, precludes the defense that the paper is not what the signing party understood it to be, when that paper is put into circulation and falls into the hands of an innocent holder.

And on the facts in this case, if you find the plaintiffs are holders in due course, and for value, as I have defined those terms, then plaintiffs are entitled to recover the full amount of the note with interest, and such further amount as you may find to be a

reasonable attorney's fee, whatever might have been the result if the action had been between the original parties to it, namely, been brought by the A. C. Ruby Company, to whom the note was given."

Twelfth: The Court erred in refusing to give the following Instruction No. 9, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:
[191]

"One who purchases a negotiable note for value, before maturity, does not owe the maker the duty of making active inquiry into the origin or consideration of the note before purchasing the same. The purchaser's right to recover can only be defeated by showing that he had actual notice of the facts which impeach the validity of the paper."

Thirteenth: The Court erred in refusing to give the following Instruction No. 10, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

"If you find the plaintiffs took this note, before maturity, for value, then they are entitled to recover against the defendant, unless you shall find from the evidence that it has been shown in the transaction between plaintiffs and A. C. Ruby, by which plaintiffs acquired title to the note, that the plaintiff had knowledge of facts which would render the same invalid as against the defendant, or unless you find that the plaintiffs were guilty of bad faith in taking said note, and I instruct you that the burden of prov-

ing such knowledge, or bad faith, is upon the defendant."

Fourteenth: The Court erred in refusing to give the following Instruction No. 11, requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

"There is one other phase of the defense which might be noticed. It is claimed by the defendant that he was to have his share for nothing, but this does not constitute a defense, it does not exempt him from liability, since the only evidence of it comes from him alone, and he cannot be heard for this purpose to impeach the written agreement which he executed, by undertaking to contradict that written instrument by oral testimony. If that could be done, there would be no sanctity to written contracts."

Fifteenth: The Court erred in refusing to take from the jury the question as to the warranty of the condition of the horse, for the reason that it appears from the testimony that all the terms of the guaranty, are contained in the written guarantee (marked Exhibit "A"), and it appearing from said guarantee that in case of breach thereof the defendant was to return the horse to the barns of The A. C. Ruby Company at Portland, Oregon, and receive another stallion in his stead. The testimony of defendant shows that he never at any time returned the stallion to the barns of A. C. Ruby Co. at Portland, Oregon, though Henry Stroh did testify to the effect that he returned the stallion [192] and was un-

able to find one that suited him in exchange. But the admitted testimony shows that the A. C. Ruby Company repeatedly offered to make good the guarantee, and to give defendant another stallion, as is shown by the testimony of the defendant himself as follows:

Q. Mr. Ruby has at all times offered to give you another horse, has he not?

A. He has offered several times to give me another horse but I never had any horse to trade.

And defendant also admitted that he received from Ruby & Company a letter or telegram reading as follows:

“Portland, Oregon, Jan. 25, 1912.

Mr. Thos. S. Poindexter,
Farmington, Wash.

Dear Sir:—

My new shipment of horses are now at home and getting in good shape. Come down and make your selection according to agreement. I have some of the best horses in this lot that I have ever imported. Of course they don't look as well now as they will in a short time, as they were 27 days in transit. The sooner you come, the more you will have to select from. I will be away the first week in February. You had better let me know when you are coming.”

WHEREFORE, plaintiffs in error pray that the judgment of said Court be reversed, set aside and held for naught.

J. H. FORNEY,
FORNEY & MOORE and
WILSON & NEAL,
Attorneys for Plaintiffs in Error.

[Endorsed]: Filed Oct. 18, 1913. A. L. Richardson, Clerk. [193]

*In the District Court of the United States Within
and for the District of Idaho, Central Division.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs,

vs.

THOS. S. POINDEXTER,
Defendant.

Writ of Error Bond.

KNOW ALL MEN BY THESE PRESENTS,
That the United States Fidelity and Guaranty Company, of Baltimore, Maryland, a corporation authorized and empowered, under the laws of the State of Idaho, to become surety on bonds, undertakings, etc., in the State of Idaho, is held and firmly bound unto defendant Thos. S. Poindexter, in the full and just sum of Three Hundred Dollars, to be paid to the said Thos. S. Poindexter, his attorneys, successors, administrators, executors or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors and administrators, jointly and severally, by these presents.

Signed and dated this 9th day of October, A. D. 1913.

WHEREAS lately, at a regular term of the District Court of the United States, for the District of Idaho, Central Division, sitting at Moscow in said District, in an action pending in said court between

J. M. Leiter and Floyd J. Campbell, as plaintiffs, and Thos. S. Poindexter, as defendant, carrying No. 525 on the law docket of said court, final judgment was rendered against the said plaintiffs for the sum of \$179.50, Dollars, costs and disbursements, and the said plaintiffs have obtained a Writ of Error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment of the said court in the aforesaid action, and a citation directed to the said Thos. S. Poindexter, defendant in error, [194] citing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, according to law, within thirty days from the date hereof.

NOW the condition of the above obligation is such that, if the said J. M. Leiter and Floyd J. Campbell, plaintiffs, shall prosecute their Writ of Error to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY.

[Corporate Seal]

By E. L. THOMPSON,

Its Attorney in Fact.

J. M. LEITER.

FLOYD J. CAMPBELL.

Witness:

O. A. NEAL.

Approved this 18th day of October, 1913.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Oct. 18, 1913. A. L. Richardson, Clerk. [195]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs in Error,

vs.

THOMAS S. POINDEXTER,
Defendant in Error.

Writ of Error [Original].

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States, for the District of Idaho:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea, which is in the said District Court before you, or some of you, between J. M. Leiter and Floyd J. Campbell, plaintiffs, and Thomas S. Poindexter, defendant, a manifest error hath happened, to the great damage of the said J. M. Leiter and Floyd J. Campbell, plaintiffs in error, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals

[Seal] A. L. RICHARDSON,
Clerk U. S. District Court, District of Idaho.
Allowed by:

[Endorsed]: (Original.) No. 525. In the United States District Court, District of Idaho, Northern Division. J. M. Leiter and Floyd J. Campbell, Plaintiffs in Error, vs. Thomas S. Poindexter, Defendant in Error. Writ of Error. Filed October 18, 1913. A. L. Richardson, Clerk. [198]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs in Error,
vs.

THOMAS S. POINDEXTER,
Defendant in Error.

Citation [on Writ of Error].

The President of the United States, to Thomas S.
Poindexter and C. J. Orland and J. T. Brown,
His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the District of Idaho, wherein J. M. Leiter and Floyd J. Campbell are plaintiffs in error and the said Thomas S. Poindexter is defendant in error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 18th day of October, 1913, of the Independence of the United States the

one hundred and thirty-eighth year.

FRANK S. DIETRICH,
District Judge.

[Seal] Attest: A. L. RICHARDSON,
Clerk. [199]

[Endorsed]: (Original.) No. 525. In the District Court of the United States for the District of Idaho, Central Division. J. M. Leiter and Floyd J. Campbell, Plaintiffs in Error, vs. Thomas S. Poindexter, Defendant in Error. Citation. Filed Oct. 23, 1913. A. L. Richardson, Clerk.

Service by copy of annexed citation and also copy of Writ of Error is hereby admitted at Moscow, this the 21st day of October, 1913.

C. J. ORLAND,
Attorney for Defendant. [200]

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

[Seal] A. L. RICHARDSON,
Clerk. [201]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for the
District of Idaho.*

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs in Error,
vs.

THOMAS S. POINDEXTER,
Defendant in Error.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 202, inclusive, to be full, true, and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$105.30, and that the same has been paid by the plaintiffs in error.

Witness my hand and the seal of said court this 25th day of October, 1913.

[Seal]

A. L. RICHARDSON,
Clerk. [202]

[Endorsed]: No. 2335. United States Circuit Court of Appeals for the Ninth Circuit. J. M. Leiter and Floyd J. Campbell, Plaintiffs in Error, vs. Thomas S. Poindexter, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Central Division.

Received and filed October 30, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

J. M. LEITER and FLOYD J. CAMPBELL,

Plaintiffs in Error,

vs.

THOMAS S. POINDEXTER,

Defendant in Error.

Brief of Plaintiffs in Error

Upon Writ of Error to the United States District Court
of the District of Idaho, Central Division.

FORNEY & MOORE,

WILSON & NEAL,

Attorneys for Plaintiffs in Error.

C. J. ORLAND and J. T. BROWN,

Attorneys for Defendant in Error.

SEP 3 - 1914

F. D. Monckton,
Clerk.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

J. M. LEITER and FLOYD J. CAMPBELL,

Plaintiffs in Error,

vs.

THOMAS S. POINDEXTER,

Defendant in Error.

Brief of Plaintiffs in Error

**Upon Writ of Error to the United States District Court
of the District of Idaho, Central Division.**

FORNEY & MOORE,

WILSON & NEAL,

Attorneys for Plaintiffs in Error.

C. J. ORLAND and J. T. BROWN,

Attorneys for Defendant in Error.

STATEMENT OF FACTS.

This is an action brought to recover upon an instrument in writing, reading as follows:

“STOCKHOLDER’S PURCHASING CONTRACT.

Feb. 14, 1911.

After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53,347, owned by The A. C. Ruby Co., of Portland, Ore., and recognizing his value as a means of improving our horse stock, we the undersigned subscribers, hereby purchase said Stallion of the A. C. Ruby Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

\$2800.00

Portland, Oregon, Feb. 14th, 1911.

For value received, I promise to pay to the order of The A. C. Ruby Co., the sum of Twenty-eight Hundred Dollars, payable at the Merchants’ National Bank, Portland, Oregon, in payments as follows:

One Thousand and 00-100 Dollars, Oct. 1st, 1911.

Nine hundred and 00-100 Dollars, Oct. 1st, 1912.

Nine hundred and 00-100 Dollars, Oct. 1st, 1913.

with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid, the whole sum of both principal and interest become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay reasonable attorneys fees.

THOS. S. POINDEXTER.

HENRY STROH.”

Which instrument it is admitted was purchased by the plaintiffs in error prior to maturity and without notice and for value (Record, page 34).

Which instrument the plaintiffs in error, upon the trial, claimed and still claim is a negotiable promissory note. Upon the trial of the case the Court held that said instrument was not a negotiable promissory note (Trans. pp. 34-35), and that plaintiffs in error had no greater rights against the defendant than the original payee would have had if the action had been brought by the original holder, The A. C. Ruby Co., and refused to permit the plaintiffs in error to introduce in evidence testimony tending to show that they were bona fide holders of said instrument for value, and that they took it before maturity and without notice of any defenses thereto. And the Court in instructing the jury took from the jury the question whether plaintiffs were bona fide holders thereof and informed the jury that plaintiffs were not bona fide holders thereof (Transp. p. 150).

And refused to give the requested instructions of plaintiffs or to instruct the jury as to the rights of a bona fide holder of a negotiable instrument.

The jury returned a verdict in favor of the defendant in error, upon which the judgment, sought to be reversed, was entered.

SPECIFICATION OF ERRORS.

(Rule 24 Subd. 2b.)

As set forth in assignment of errors (Record pp. 198 to 206), these plaintiffs in error do now specify the errors upon which they intend to rely:

FIRST: The Court erred in refusing to permit the plaintiffs to offer in evidence and read to the jury the depositions of J. M. Leiter and Floyd J. Campbell, plaint-

iffs, and of the witness, A. C. Ruby, tending to show that the plaintiffs were **bona fide** holders of the note for value and that they took it before it became due without notice of any defenses thereto.

SECOND: The Court erred in instructing the jury that the instrument sued upon in this cause, reading as follows:

“STOCKHOLDERS’ PURCHASING CONTRACT.

After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53,347, owned by the A. C. Ruby Co., of Portland, Ore., and recognizing his value as a means of improving our horse stock, we, the undersigned subscribers, hereby purchase said Stallion of the A. C. Ruby Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

\$2800.00

Portland, Oregon, Feb. 14th, 1911.

For value received I promise to pay to the order of The A. C. Ruby Co., the sum of Twenty-eight Hundred Dollars, payable at the Merchants National Bank, Portland, Oregon, in payments as follows:

One Thousand and no 00 Dollars. . . . Oct. 1st, 1911.

Nine Hundred and no 00 Dollars. . . . Oct. 1st, 1912.

Nine Hundred and no 00 Dollars. . . . Oct. 1st, 1913.

with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid, the whole sum of both principal and interest to become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay reasonable attorneys fees.

THOS. S. POINDEXTER,
HENRY STROH.”

was not a negotiable promissory note.

THIRD: The Court erred in instructing the jury as shown by the instructions given by the Court (Record, p. 150), as follows:

“Sometimes where an instrument is in what we call a negotiable form, as a check or ordinary promissory note, the transferee of such instrument has rights greater than the payee but, for certain reasons which are unnecessary to explain you, I have held as a matter of law that this is not a negotiable instrument in the sense that the purchaser of it has greater rights than the payee and therefore I say to you that the plaintiffs here stand in the shoes of A. C. Ruby, and have just as much right as he would have had if it had never been transferred, but no greater right.”

for the reason that said instructions took from the jury the question whether the plaintiffs were bona fide holders of the note sued upon, and informed the jury that the plaintiffs were not **bona fide** holders thereof.

FOURTH. The Court erred in refusing to give the following instruction No. 1 (Record, p. 156), requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“A negotiable instrument is a contract in writing whereby one or more persons promise to pay to the order of one or several persons a definite sum, at a future time named in the instrument, and, under this rule the note sued on in this action is a negotiable promissory note, and you should so regard it.”

FIFTH: The Court erred in refusing to give the following instruction No. 2 (Record, p. 157), requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, namely:

“A holder in due course is one who, for a valuable consideration, before maturity, takes such an instrument under the following conditions:

1. It must be complete and regular upon its face, and I instruct you that this note is such an instrument.

2nd. He must have become the holder before the note was overdue, and, if you find the plaintiffs are such holders, they did become such before it was overdue.

3rd. They must have taken it in good faith, and for value, as to this, if the plaintiffs had no notice that the defendant claimed fraud in the execution of the note, before they took the note from the A. C. Ruby Company, it would make no defense that you may find, as a matter of fact, that there was fraud in the securing of the note from the defendant by The A. C. Ruby Company or its agents. Under such circumstances, plaintiffs would take the note as holders in due course. If you find that the plaintiffs are the holders of the said note in due course, then the fact that the defendant may have been induced to sign the note, through the misrepresentations he has testified to, would not discharge him from liability on the note as against the plaintiffs here, for, if the defendant had an opportunity to read the note, and failed in that regard, if he failed to investigate—to observe—to ascertain what the instrument was, in the hands of the plaintiffs, if you find that plaintiffs are holders in due course, for value, defendant cannot be held to defend against it.

4. At the time the note was negotiable, plaintiffs must have had no notice of any infirmity in this note. If you find that the plaintiffs are such holders of the note, then the fact that the defendant might have been induced to sign the note, through the misrepresentations he has testified to, would not discharge him from liability as against plaintiffs.”

SIXTH: The Court erred in refusing to give the following instruction No. 3 (Record, p. 158), requested by plaintiff, for the reason that the said instruction is not embraced within the Instructions of the Court, and is further based upon the facts in the case, viz.:

“One who takes negotiable paper, before maturity, for value, is entitled to recover against the maker, unless it is shown that, in the transaction by which title was acquired, the endorsee had knowledge of facts which would render the same invalid against the maker, or was guilty of bad faith, and the burden of proving such knowledge or bad faith is upon the defendant.”

SEVENTH: The Court erred in refusing to give the following Instruction No. 4 (Record, p. 158), requested by the plaintiff, for the reason that said instruction is not embraced within the instructions of the Court and is further based upon the facts in the case, viz.:

“The title to a negotiable promissory note passes by endorsement, and one who takes a negotiable promissory note by endorsement, before maturity, for a valuable consideration, in the regular course of business, without notice of infirmities, is called a holder in due course, and is entitled to collect it of the maker, even though the maker might have a good and valid defense against the original payee of the note.”

EIGHTH: The Court erred in refusing to give the following Instruction No. 5 (Record, p 159), requested by the plaintiffs, for the reason that said instruction is not embraced within the Instructions of the Court, and is further based upon the facts in the case, viz.:

“If you find from the evidence that when Campbell and Leiter received the note made by the defendant, a copy of which is set forth in the complaint herein, in

favor of the A. C. Ruby Company, they knew of nothing to apprise them, or put them upon inquiry with respect to the claim now made by the defendant that said note was given without consideration, or procured by fraud, your verdict should be for the plaintiffs for the full amount sued for.”

NINTH: The Court erred in refusing to give the following Instruction No. 6 (Record, p. 159), requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

“As to what notice of the infirmity of the note the plaintiffs should have had, I charge you that they must have had actual notice of some defect in the instrument. It is not sufficient to defeat their claim that they are holders in due course to show simply suspicious circumstances. You must be able to find from the evidence that plaintiffs did know—had actual notice—of the fraud claimed before you can consider the defense which the defendant imposes regarding the fraudulent character of the transaction by which the defendant claims he was induced to sign the note.”

TENTH: The Court erred in refusing to give the following instruction No. 7 (Record, p. 160), requested by the plaintiffs, for the reason that said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

“I instruct you that nothing contained in the note itself would in any way be notice to plaintiffs of any infirmity in the note.”

ELEVENTH: The Court erred in refusing to give the following Instruction No. 8 (Record, p. 160), requested by the plaintiffs, for the reason that said instruction

is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

“It is the part of ordinary prudence for one who is asked to sign a contract, or obligation relating to business matters of importance, to investigate, and failure to do so, to read when opportunity is given to read, to look when opportunity is afforded to look, to examine when the instrument is submitted for examination, precludes the defense that the paper is not what the signing party understood it to be, when that paper is put into circulation and falls into the hands of an innocent holder.

And on the facts in this case, if you find the plaintiffs are holders in due course, and for value, as I have defined those terms, then plaintiffs are entitled to recover the full amount of the note with interest, and such further amount as you may find to be a reasonable attorney’s fee, whatever might have been the result if the action had been between the original parties to it, namely, been brought by the A. C. Ruby Company, to whom the note was given.”

TWELFTH: The Court erred in refusing to give the following Instruction No. 9 (Record, p. 151), requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

“One who purchases a negotiable note for value, before maturity, does not owe the maker the duty of making active inquiry into the origin or consideration of the note before purchasing the same. The purchaser’s right to recover can only be defeated by showing that he had actual notice of the facts which impeach the validity of the paper.”

THIRTEENTH: The Court erred in refusing to

give the following Instruction No. 10 (Record, p. 169), requested by the plaintiffs, for the reason that the said instruction is not embraced within the instructions of the Court, and is further based upon the facts in the case, viz.:

“If you find the plaintiffs took this note, before maturity, for value, then they are entitled to recover against the defendant, unless you shall find from the evidence that it has been shown in the transaction between plaintiffs and A. C. Ruby, by which plaintiffs acquired title to the note, that the plaintiff had knowledge of facts which would render the same invalid as against the defendant, or unless you find that the plaintiffs were guilty of bad faith in taking said note, and I instruct you that the burden of proving such knowledge, or bad faith, is upon the defendant.”

AUTHORITIES.

The note sued upon was clearly a negotiable promissory note.

Lord's Oregon Laws, Sections 5834, 5835, 5836, 5837, 5868.

Remington-Ballanger's Codes and Statutes of Wash., Sections 3392, 3393, 3394, 3395, 3396.

Negotiable Instrument Act, Sections 1, 2, 3, 4, 5.

Ireland v. Sharpenberg, 103 Pac., 801, 54 Wash., 558;

Chicago Railway Equipment Co. v. Merchants Nat'l Bank, 136 U. S., 268, 34 (L. ed.) 349;

Zellman v. Jackson, 238 Ill., 290;

United States National Bank v. Floss, 38 Or., 68;

Siegel v. Chicago Trust & Sav. Bank, 131 Ill., 569,
23 N. E., 417;

First Nat'l Bank v. Michael, 1 S. E., 857 (N. C.);

State Nat'l Bank v. Cason, 2 South, 881;
7 Cyc, page 948.

ARGUMENT.

(Rule 24 Subd. 2c.)

POINTS OF LAW AND FACTS DISCUSSED.

The question to be determined is whether the note sued upon is negotiable (all of the assignments of error from 1 to 13, inclusive, go to the presenting of this one question).

The only contention made upon the trial that the note sued upon was not a negotiable instrument was based solely upon the words appearing at the beginning thereof to-wit:

“STOCKHOLDERS’ PURCHASING CONTRACT.

Feb. 14, 1911.

After a good and satisfactory examination of the Percheron Stallion named Ithos No. 53,347, owned by The A. C. Ruby Co., of Portland, Ore., and recognizing his value as a means of improving our horse stock, we, the undersigned subscribers, hereby purchase said stallion accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.”

The remaining portion of the note being as follows:

“\$2800.00

Portland, Oregon, Feb. 14, 1911.

For value received, I promise to pay to the order of The A. C. Ruby Co., the sum of Twenty-eight Hundred Dollars, payable at the Merchants National Bank, Portland, Oregon, in payments as follows:

One Thousand and no 00 Dollars. . Oct. 1st, 1911.

Nine Hundred and no 00 Dollars, Oct. 1st, 1912.

Nine Hundred and no 00 Dollars, Oct 1st, 1913.

with interest from date at the rate of eight per cent, payable semi-annually, and if not so paid, the whole sum of both principal and interest to become due and collectible at the option of the holder thereof, and in case suit or action is instituted to collect payment I agree to pay a reasonable attorney's fees.

THOS. S. POINDEXTER,
HENRY STROH.”

It is contended by defendant that the words at the beginning of the note make the note non-negotiable under Section 5 of the Negotiable Instrument Act, which section has been adopted in Oregon and Washington.

Section 5 of the Negotiable Instrument Act provides:

“An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable; but the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) authorizes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of the obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall

validate any provision or stipulation otherwise illegal.”

The contention of plaintiffs in error is that said provision does not in any sense contain an order or promise to do anything in addition to the payment of money. The only thing the defendant is required to do is to pay the sum of twenty-eight hundred, interest and attorney's fees in case of suit.

The most unfavorable construction that can be placed upon it is that it shows that the obligors examined and purchased a stallion from The A. C. Ruby Co., the record showing (Exhibit A, Record, p. 178) that at the same time and date they received a bill of sale for the stallion, which was admitted in evidence and was admitted to be genuine. So that the words at most can only be held to show the consideration for which the note was given, or as showing the transaction out of which it arose.

The payment of the money provided to be made is not rendered in any way uncertain, either as to time of payment or the amount to be paid, nor is payment in any way rendered conditional.

In the case of *Ireland v. Sharpenberg*, 103 Pac., 801, 54 Wash., 558, which was action upon a note given for purchase of a stallion, the note sued upon contained at the top the following words:

“Stockholders Purchasing Contract.

No. 910. Spokane, Wash., May 7th, 1906.

After a good and satisfactory examination of the Belgian Stallion named Jules D'Or 1635, No. (25894), owned by the Burgess Importing Co., of Wenona, Illinois, and recognizing his value as a means of improving our horse stock, we, the undersigned subscribers, hereby purchase said stallion of the Burgess Import-

ing Co., accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

Capital Stock, \$3200.00

Shares, \$400.00 each."

With the exception of the words "Capital Stock \$3200.00; Shares \$400.00 each," the first part of the note is substantially the same as the note in question here.

The defendants being sued upon the note by a bona fide purchaser thereof, offered in evidence the portion of the note above set forth, which had been detached, the lower court refusing to permit its introduction. The Supreme Court of the State of Washington, in the above case, held that the defendants should have been allowed to introduce said portion of said note in evidence, the Court saying:

"We have referred to the part of the writing which was detached from the note before assignment. This slip was offered in evidence by appellants (defendants) and admitted, and afterwards by the Court stricken out upon motion of respondents' attorneys, which is claimed by appellants as error. It seems to us that appellants were entitled to have this slip in evidence, since it constitutes a part of the original transaction, **and shows the consideration for which the note was given.**"

And the Court further say, page 804 of the Pacific Reporter last above referred to:

"We are of the opinion that the appellants were entitled to have the question of good faith of the respondents in the purchase of the note submitted to the jury together with the question whether or not it was originally obtained by fraud and that neither of

these questions, in the light of this record, could be determined by the Court as a matter of law.”

We contend in this case that the first part of the note sued upon merely shows what was the consideration for the note. And the law is well settled that this would not make the note non-negotiable.

“A recital in a promissory note which destroys its negotiability must be of a kind that in some respect qualifies or makes uncertain or conditonal the promise.”

Zollman v. Jackson, 238 Ill., 290.

In the case of Chicago Railway Equipment Co. v. Merchants National Bank, 136 U. S., 268, 34 (L. ed.) 349, the Court held a note to be negotiable, which reads as follows:

“\$5000 Chicago, Ill., January 20 ,A. D. 1884.

For value received, four months after date, the Chicago Railway Equipment Company promise to pay to the order of the Northwestern Manufacturing and Car Company of Stillwater, Minnesota, five thousand dollars at First National Bank of Chicago, Illinois, with interest thereon at the rate of — per cent per annum from date until paid.

This note is one of a series of twenty-five notes, of even date herewith of the sum of five thousand dollars each, and shall become due and payable to the holder on the failure of the maker to pay the principal and interest of any one of the notes of said series, and all of said notes are given for the purchase price of two hundred and fifty railway freight cars manufactured by the payee hereof and sold by said payee to the maker hereof, which cars are numbered from 13,000 to 13,349, inclusive, and marked on the side thereof with the words and letters ‘Blue Line, C. &

E. I. R. R. Co., and it is agreed by the maker hereof that the title to said cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid, all of said notes being equally and ratably secured on said cars.

No. 1.

GEORGE B. BURROWS,
Vice-President.

Countersigned by E. D. Buffington, Treasurer.

Northwestern Manufacturing and Car Co.,
Per J. C. Gorman, Treas."

The Court in deciding the case, say, page 284:

"Without deciding whether the notes here in suit would or would not be negotiable securities if the transaction between the parties had been a conditional sale, we are of the opinion that they are of the class of instruments that are negotiable according to the mercantile law, and which in the hands of a bona fide holder for value are protected against defenses of which the maker might avail himself if sued by the payee. They are promises in writing to pay a fixed sum of money to a named person or order, at all events, and at a time which must certainly arrive."

"The breach of an executory contract which is the consideration for a negotiable promissory note is not a defense at all against such note in the hands of an indorsee for value before maturity, even if he had notice of the contract, unless before purchasing he also knew of the breach."

United States National Bank v. Floss, 38 Or., 68.

In the case of Siegel v. Chicago Trust & Savings Bank 131, Ill., 569, 23 N. E., 417, the instrument sued on was as follows:

“Chicago, March 5th, 1887, On July 1st, 1887, we promise to pay D., or order, the sum of Three Hundred Dollars for the privilege of one framed advertising sign in one end of a certain number of the street cars of North Chicago City Railway Co., for a term of three months from May 15th 1887.

SIEGEL, COOPER & CO.”

the court in holding the note to be negotiable say:

“But the question remains whether the statement, or recital of the consideration, on the face of the instrument, impairs its negotiability, and in this instance amounted to a conditon precedent. The mere fact that the consideration for which the note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee will not destroy its negotiability, unless it appears through the recital that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid.”

The Court in *First National Bank v. Michael*, 1 S. E., 857 (N. C.), say:

“The mere fact that the particular consideration of the note is mentioned in it, and that it possibly might involve or give rise to equities between the parties to it, cannot prevent its negotiability by indorsement. To have this effect it must appear from reference to it in the note that it qualifies the promise to pay the sum of money specified and renders it conditional, or the amount to be paid uncertain.”

In the case of *State Nat'l Bank v. Cason*, 2 South, 881, at page 882, the Court say:

“It cannot affect the negotiability of a note that

its consideration is to be hereafter realized, or that from some contingency it may never be enjoyed.”

By the decided weight of authority the recital in a note of the consideration for which it was given is not of itself sufficient to apprise a purchaser of the failure of the same or to put him on inquiry concerning such failure.

7 Cyc., page 948.

Section 1 of the Negotiable Instrument Act, which has been adopted in Oregon and Washington (Section 5834 Lord's Oregon Laws; Section 3392 Remington & Ballanger's Code), defines what it takes to constitute a negotiable instrument, as follows:

“An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand, or at a fixed or determinable future time; (4) must be payable to order or to bearer; and (5) where the instrument is addressed to a drawee, he must be named or otherwise indicated therein within reasonable certainty.”

Section 2 of the Negotiable Instrument Act, which has been adopted in Oregon and Washington (Section 5835, Lord's Oregon Laws, and Section 3393, Remington & Ballanger's Code), provides:

“The sum payable is a sum certain within the meaning of this act, although it is to be paid (1) with interest; or (2) by stated installments; or (3) by stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due; or (4) with exchange, whether at

a fixed rate or at the current rates; or (5) with cost of collection or an attorney's fee, in case payment shall not be made at maturity."

Section 3 of the Negotiable Instrument Act, which has been adopted in Oregon and Washington (Lord's Oregon Laws, Section 5836, and Remington & Ballanger's Code, Section 3394), provides:

"An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) **a statement of the transaction which gives rise to the instrument.** But an order or promise to pay out of a particular fund is not unconditional."

Section 4 of the Negotiable Instrument Act, which has been adopted in Oregon and Washington (Lord's Oregon Laws, Section 5837, and Remington and Ballanger's Code, Section 3395), provides:

"An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable (1) at a fixed period after date or sight; or (2) on or before a fixed or determinable future time specified therein; or (3) on or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable and the happening of the event does not cure the defect."

The note in question here conforms to every requirement necessary to constitute a negotiable instrument under the foregoing sections of the Negotiable Instrument Act, or under the Law Merchant, viz: It is in writing;

signed by the makers; contains an unconditional promise to pay a sum certain in money at a fixed future time, and is payable to order of the payee. Nothing more is required.

The mere fact that the note contains a statement of the transaction which gave rise to it does not in any way make it non-negotiable, because Section 3 of the act expressly provides that the promise to pay is unconditional even though it contains **“a statement of the transaction which gives rise to the instrument.”**

For the foregoing reasons the writ of error should be allowed and the judgment of the said district court be reversed.

FORNEY & MOORE,
WILSON & NEAL,
Attorneys for Plaintiff in Error.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs in Error,
vs.
THOMAS S. POINDEXTER,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the United States District
Court of the District of Idaho, Central Division.

FORNEY & MOORE,
WILSON & NEAL,
Attorneys for Plaintiff in Error.

C. J. ORLAND,
Attorney for Defendant in Error.

FILED

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F. D. MONCKTON

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ARGUMENT.

This action was brought by the plaintiffs, upon a certain written instrument, who are now plaintiffs in error, the instrument is shown upon pages 198-9 of transcript.

The instrument is claimed to be a negotiable promissory note, to have been made by the defendant and one Henry Stroh, who is not made a party herein, and that the plaintiffs in error are bona fide purchasers of the instrument, in due course and before the maturity thereof.

To the complaint of the plaintiffs in error, the defendant answered, and deny the making or executing of the instrument and every material allegation set forth in the complaint of the plaintiff in error. (Transcript commencing at page 7).

For a separate defense the defendant answering further, (Commencing at page 10 of transcript) alleges: that the transaction out of which the claimed and pretended promissory note was obtained, was in regard to a stallion, which the payees thereof, Ruby & Co. undertook to sell, and perhaps did sell to Henry Stroh, one of the parties to the instrument, to the extent of six-sevenths of the interest in said stallion, the other one-seventh, was in reality a gift to the defendant herein, but evidently done for the purpose of obtaining his name to the instrument, which was successful on the part of the agent of Ruby & Co. (Transcript from page 36 to 43).

The defendant further answered, that the stallion was diseased and worthless for breeding purposes or any other; that the signature of the defendant was obtained by misrepresentation and fraud; that the defendant never signed, or intended to sign a promissory note; that the instrument was changed and altered into a promissory note after the signature of the defendant was obtained thereto; that the instrument when signed by the defendant, as well as Henry Stroh purported to be a Stockholders' Purchasing Contract, required by Ruby & Co. to be signed by purchasers of horses and authorizing, by the order therein contained, the delivery of the horse to one of the purchasers; that the instrument, after the signatures of the defendant and Stroh were obtained thereto, was changed into the instrument that appears in the transcript, heretofore referred to on page 198 and 199 of the transcript.

The defendant also assails, by his answer, the bona fides of the sale and transfer of the instrument by the A. C. Ruby Co. to the plaintiffs in error.

The evidence on most of the questions involved, were to some extent conflicting, and have been determined, by the jury, in the defendant's favor, by its verdict, which is general, (Transcript page 20).

There are two main defenses in the case, both of which were fairly submitted to the jury, by the court.

The first of which is, whether the defendant signed the instrument in the condition in which it appeared, when introduced in evidence, or whether it

had been changed and altered from an innocent agreement of purchase of the stallion mentioned therein, and an order for the delivery of the horse to one of the parties whose name appears upon the instrument, and designated as "Stockholders' Purchasing Contract" to a promissory note.

This question was fairly submitted to the jury, by the court, by its instructions, (Transcript pages 151 to 153).

This alone was decisive of the case, by the verdict of the jury, in the defendant's favor, the jury, in effect said, that there was no promissory, that the defendant never made to the A. C. Ruby Co. such a note, and that no such promissory note existed, as to this defendant, and that all that the defendant signed was the agreement of purchase and an order for the delivery of the stallion.

There is no conflict in the evidence, that the defendant was not indebted to A. C. Ruby Co., the payee of the instrument, in any amount whatever, for any interest in the stallion or otherwise.

There being no part of the sale price of the stallion owing by the defendant to the A. C. Ruby Co. There was no debt owing by the defendant or for which he was or became liable, except, that, which might arise by reason of liability, on account of the instrument in controversy, and there was no reason for his signing such an instrument as this now purports to be, and charge himself with liability for a debt which he did not owe, and which he had refused to incur, (Transcript pages 37 and 48).

If the defendant did not sign the instrument in the form in which it appeared in court, but that part which constitutes the instrument a note was written in and filled out after the signature of the defendant was obtained thereto, then there was no liability of the defendant.

The jury have so determined by their verdict, carefully submitted to them by the court, and to which part of the instructions no exception has been taken.

The second question, is as to the condition of the stallion, with reference to his soundness and ability to breed successfully, and that question was also submitted to the jury, by the court, and determined by their verdict as was the other.

The main contention of the plaintiff in error, is, as to the negotiable character of the instrument in controversy, plaintiff's Exhibit "A", (Transcript page 163), to this question is directed their motion for a directed verdict (Transcript page 148), and the exceptions to the instructions of the court, to the jury, as well rulings upon the evidence.

The court held the instrument to be non-negotiable, (Transcript page 34).

That it contains three obligations or elements of agreement.

One is an agreement to purchase the stallion named in the instrument, the second an agreement or order that the stallion might be delivered by the seller, the A. C. Ruby Co. and payee of the instrument, to

any one of the parties to the instrument, and third an agreement to pay a sum of money.

The instrument was evidently prepared and used by the A. C. Ruby Co., for the purpose of deception in the obtaining of signatures thereto, by the unwary and unsuspecting, it can well have no other object, it is worse than senseless, except for such purpose.

To construe such an instrument as a negotiable promissory note, is but to assist the unscrupulous in perpetrating frauds, in obtaining the signatures of people to similar instruments, which eventually develop into negotiable promissory notes, either with or without the innocent looking appendage, which may be separated from that part which constitutes the liability.

That from the evidence of the defendant, he had no occasion, necessity or design to sign a note, (Transcript pages 40 to 42) also evidence of Henry Stroh, (Transcript pages 82 and 83).

Various have been the instruments devised, for the purpose of procuring signatures thereto, for some apparently innocent looking purpose or object, which thereafter, by a species of legerdemain, develop into an entirely different instrument than that which the parties intended or supposed that they were signing.

Instruments of this character, should, so far as the law will permit, be construed by the courts to be non-negotiable, in order that the innocent and deceived signer may be protected, and that no one could

become a bona fide holder thereof, within the meaning of the law governing negotiable instruments, and more especially should such be the ruling of the courts, when that part of the instrument which might and is likely to deceive, is attached to the instrument, as the attention of the prospective purchaser is directly called to that part which is or might be used for deceptive purposes, and which should put such purchaser upon his guard, and to investigate and discover why, a promissory note should be commenced and headed with a deceptive title, and a title that did not express only a portion of what the instrument contained, and from such title the main part of the instrument, and that which created the liability which he was purchasing, being omitted.

In this case, the attention of a purchaser of a note of this size, could hardly be presumed not to see at a glance the heading of the instrument, to-wit: "STOCKHOLDERS' PURCHASING CONTRACT" in large and prominent letters, this of itself should be sufficient to advise a prospective purchaser of such paper to investigate the reason of such a title being affixed to such an instrument, and to warn him and cause inquiry to be made as to the conditions under which such an instrument was obtained, it should be sufficient to cause any person to suspect that there might be some infirmity in the instrument, and that it was not intended by the maker that it was other than what it purported, by its title to be, and not an agreement for the payment of money and was

never by the maker intended to be or become such an instrument.

While it is probably true, that the title of an instrument is not controlling as to the contents of the instrument and as to what it actually may be, yet it should be taken into consideration, and in this case the plaintiffs in error are claiming something by the instrument, which by its title, it is not, except in part, and of which they had notice at the time the same was transferred to them.

This instrument was made in the State of Washington and payable in the State of Oregon, the universal negotiable instrument law is in force in both states and was at the time the instrument was executed, no question of which law governs is necessary under such conditions.

The "Universal Negotiable Instrument Law," provides, as follows:

"An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable."

Plaintiff's exhibit "A" page 163 of transcript, contains a promise to purchase the stallion, named therein and also an order for its delivery, by the seller, to one of the parties whose name is signed to the instrument, also a promise, (as it now appears) to pay a sum of money in installments.

By the negotiable instrument law, certain provisions are permitted to be included, without affecting

the negotiability of the note, but an agreement for the purchase of property and an order to deliver the purchased property to one of the parties thereto, are not among the provisions authorized by the law.

The object and theory of the Universal Negotiable Instrument law, was, beside providing a uniform law throughout the United States, governing negotiable instrument, to make a fixed, predetermined and stable rule, as to what may and what may not be included in a negotiable note, and what will destroy its negotiable character.

The fifth section of the original act, (Lord's Oregon Laws, section 5838) a part of which has been heretofore quoted, provides as follows:

“An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

First. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

Second. Authorizes a confession of judgment if the instrument be not paid at maturity; or

Third. Waives the benefit of any law intended for the advantage or protection of the obligor; or

Fourth. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.”

This act especially provides that no order or promise shall be included in instruments controlled by this law, and if there be included in any such instrument, any order or promise not included within the four subdivisions of the section providing for exceptions from the general rule laid down, such order or promise will render the instrument non-negotiable.

The agreement of purchase the stallion and the order for his delivery, certainly can not be included in a negotiable instrument, under the provision authorizing the sale of collaterals; confession of judgment; waiver of any law of benefit to the obligor, or that gives the holder an election to require something to be done in lieu of the payment of money.

The word "promise" as used in the Negotiable Instrument Law is equivalent and practically synonymous with contract, covenant or agreement and is evidently used in that sense.

One of the definitions of the word "promise" as given by Webster is "In law, a declaration, verbal or written, made by one person to another, for a good or valuable consideration, in the nature of a covenant, by which the promiser binds himself, and, as the case may be, his legal representative, to do or forbear some act, and gives to the promisee a legal right to demand and enforce a fulfillment."

The instrument in controversy, has, as one of the parts of its provisions a promise, agreement or covenant to purchase the horse therein named, also an order for the delivery of the horse to one of the parties;

these provisions are both excluded by the provisions of the law, and are in violation of its strict requirements, and render the instrument non-negotiable.

Independent of the provisions of the Universal Negotiable Instrument Law, and in accordance with the usual rules governing such instruments, promissory notes in the form of the one in controversy or with similiar provisions incorporated in them, have been, by the great weight of authority, if not universally held by the courts, to be non-negotiable.

Killam v. Schoeps, 26 Kas. 310.

Rochford v. McGee, 61 L. R. A. 335.

Stevens v. Johnson, 9 N. W. 677.

Lincoln Nat'l Bank v. Perry, 66 Fed. 887.

Kimpton v. Studebaker, 14 Idaho 558.

Halladay State Bank v. Hoffman, 116 Pac. 239.

The plaintiff's in error have cited certain authorities, some of which I will refer to, the first case is that of Ireland v. Sharpenberg, 54 Wash. 558, 103 Pac. 801.

While the note sued upon in this case seems to be worded the same as is the one in controversy, except necessary changes, the question of its negotiability, on account of its form was not raised in the case, or passed upon by the court.

There was no question but that the note was complete when signed, and in the same condition that it was when offered in evidence as to the part which constitutes the promissory note.

The portion of the instrument, constituting the purchasing part of it and for the delivery of the horse, had been separated from the note part of the instrument, and the contention and decision in the case, was in regard to such separation of the two parts of the agreement.

The case does not support the position of the plaintiff in error, and does not pass upon the negotiability of the instrument, with reference to its form, in accordance with the provisions of the negotiable instrument law, and especially the fifth section thereof, the question might well have been raised, but it seems not to have been considered.

Another case cited by the plaintiff in error, is, *Chicago Railway Equipment Co. v. Merchants National Bank*, 136 U. S. 260, 34 (L. ed.) 349.

The decision in that case was based, by the Supreme Court, upon the peculiar statutes of the State of Illinois, and in following the construction, by the courts of that state, of such statute.

It was decided in 1890, under a very different statute from the present negotiable instrument law, governing this instrument.

It is based upon the question of retention of title, of personal property, in the payee, or as security for the payment of the instrument; under the law merchant, this has been a much mooted question, upon which the courts have been, prior to the adoption of the negotiable instrument law, hopelessly divided.

In Vol. 3, *Ruling Case Law*, it is said:

“The Negotiable Instruments Act is not a new law. It is, with few exceptions, merely the codification of the rules of the law merchant that previously were in force and effect by virtue of judicial pronouncement or legislative enactment.

While it does not cover the whole field of negotiable instrument law, it is decisive as to all matters comprehended within its terms. Where the act speaks, it controls; and prior conflicting adjudications must be held for naught; but where the statute is silent, resort must be had to the principles of the law merchant or the common law regulating commercial paper.”

This act, has, by its positive terms, precluded the including of matter not strictly applicable to commercial paper, except in the few instances, which are specifically provided, and by the rule of construction, nothing should be included in the paper, not specially permitted, and everything not specified should be rigidly excluded therefrom.

The law is intended to create uniformity in such instruments, and if one agreement not provided for may be included, then another may be, and there would be no end to confusion, and what might be included and what might not be included, would soon become as uncertain, as it was before the passage of this law, as to what might or might not effect the negotiable character of the instrument, as to the transferree in due course.

The main question in the case of the Chicago Rail-

way Equipment Co. v. Merchants National Bank, *supra*. has been directly passed upon, by at least one court, with direct reference to the negotiable instrument law, and holding such a provision in a promissory note, renders it non-negotiable.

Kimpton v. Studebaker, 14 Idaho 558.

Another case cited by the plaintiff in error, is United States National Bank v. Floss, 38 Ore. 68, 62 Pac. 751.

Two questions were involved in this case, the first, that the non-payment of interest due, is not such a dishonor of the note as will render it non-negotiable, so as to admit of defenses, as against a purchaser in due course.

Second, that knowledge by the indorsee, at time of transfer, of the consideration for which the note was given, will not prevent a recovery upon a note, or admit of defenses against an indorsee in due course, unless the indorsee also knows that there has been a breach of the contract out of which the consideration for the note arose.

Neither of these questions are involved in the case at bar, and falls far short of being an authority in support of the proposition of the plaintiff in error, that the conditions of the note in controversy is negotiable, within the rule of protection to an indorsee in due course.

The instrument in controversy as a negotiable instrument, under the negotiable instrument law, does

not comply with the restrictions of the law with reference to what may be contained in a negotiable instrument.

The writ of error should be denied, and the judgment of the District Court affirmed.

C. J. ORLAND,
Attorney for Defendant in Error.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs in Error,

vs.

THOMAS S. POINDEXTER,
Defendant in Error.

**MOTION OF PLAINTIFFS IN ERROR FOR RE-
HEARING.**

Upon Writ of Error to the United States District Court
of the District of Idaho, Central Division.

FORNEY & MOORE and WILSON & NEAL,
Attorneys for Plaintiffs in Error.

C. J. ORLAND and J. T. BROWN,
Attorneys for Defendant in Error.

Filed
MAR 15 1915

F. D. Monckton,
Clerk.

No. 2335

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Upon Writ of Error to the United States District Court
of the District of Idaho, Central Division.

PETITION FOR REHEARING.

Now comes the plaintiffs in error and respectfully
petition this Honorable Court for a rehearing herein,
for the following reasons, to-wit:

The Court in its opinion, as we understand it, hold
that the jury found as a fact that defendant did not
sign the instrument with its condition of a promise to

pay, and that, therefore, it was clearly no longer material to determine whether the instrument, with the condition in it, is or is not a negotiable promissory note.

The defendant testified upon the trial, as shown on pages 48 and 49 of the Transcript of Record, as follows:

“Q. You were a witness in this case last November here, were you not?

A. Yes, sir.

Q. And you examined at that time plaintiffs' Exhibit A (the note in question) did you not?

A. Yes, sir.

Q. And that is your signature?

A. Yes, sir.

Q. Now, as I understand you, you read this over carefully before signing it?

A. Yes, sir.

Q. And you did not understand at all you were signing a note, did you?

A. There was no note here, only a blank form.

Q. You examined everything on the paper, did you?

A. Yes, sir.

Q. And when you saw this portion of the instrument, what did you think about it?

‘For value received I promise to pay to A. C. Ruby Company the sum of.....Dollars, payable at the Merchants’ National Bank, Portland, Oregon, in payments as follows: with interest from date at the rate of eight per cent, payable semi-annually, and, if not so paid the whole amount of both principal and interest to become due and collectible at the option of the holder hereof; and in case suit or action is instituted to collect payment, I agree to pay reasonable attorney fees.’

Did you sign all of that?

A. Yes, sir; all of that was printed.”

The defendant also sets forth in his answer (Trans. p. 12) the instrument that he signed, showing the same as above.

This shows conclusively that the defendant, at least, signed the note with the blank spaces unfilled, and the lower Court instructed the jury that the defendant admitted the signature on the note was his (Trans. of Record, p. 152).

The defendant further testified (pp. 41 and 42 Trans. of Record) that when he signed the paper there was nothing made out in the way of a note. It was blank, only the printed part, and when the papers were made out he was ready to close the deal and turn over the horse.

“Q. Mr. Watson told you that?

A. Yes, sir; he was not ready to make out the papers to finish up the deal. I says: 'I have no papers to make out, and what I got to do with that?' and he says: 'You will have to sign the contract before I can deliver the horse over to you.' I says: 'Very well. And what kind of a contract have you got. I will look at it.' He showed me, and I told him I did not like to sign any contract like that, and asked him if he had any other. He told me that was the only contract the company furnished, and I told him I did not like to sign a blank like that, and I stood a little and said to myself that a big company like that would not try to beat a man, and I signed my name to the contract, and there was nothing in it but the blanks on that date."

It is further clear from the defendant's own testimony that he signed the note "Exhibit A" shown on page 163 Trans. of Record, containing all the printed portion. The defendant simply claimed that the amount and time of payment were filled in after he delivered it to Watson, the agent of the A. C. Ruby Company.

It was also admitted, as shown on pages 34 and 35 of the Trans. of Record, that the plaintiffs were bona fide holders of the note.

This presents a situation where it is admitted defendant signed the instrument in the form shown in plaintiffs' "Exhibit A" with the exception of amount and time of payment; that the instrument was delivered to Watson as agent of the A. C. Ruby Company, by the defendant, after he had signed it in blank, as he says, and that said instrument was duly transferred by A. C. Ruby Company to the plaintiffs, prior to its maturity, for value; in other words, that plaintiffs were bona fide holders of the paper. Under these circumstances we

submit that the law is that if the defendant signed a blank note, as he says he did, and delivered same to A. C. Ruby Company, or the agent of A. C. Ruby Company, and after it was delivered by the defendant it was filled in as to the amount and time of payment, as defendant claims, and was thereafter transferred, prior to maturity, to plaintiffs as bona fide holders, that the fact that as between defendant and A. C. Ruby Company, the note would not be good would not be a defense as against the plaintiffs who are bona fide holders thereof.

This question has been passed upon by the Supreme Court of the United States in the case of the Bank of Pittsburgh vs. John S. Neal et al., reported in 22 Howard (U. S.) 96, from which we quote the syllabus:

“Where a party to a negotiable instrument entrusts it to the custody of another, with blanks not filled up, such negotiable instrument carries on its face an implied authority to fill up the blanks, and to perfect the instrument.

“A bona fide holder of a negotiable instrument, for a valuable consideration, without notice of the facts which impeach its validity between the antecedent parties, if he takes it before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity.”

The same rule is laid down in Ogden on Negotiable Instruments, section 33, pages 281, 282 and 283, where a large number of cases are cited, holding to the same effect.

Section 5847 of Lord's Oregon Laws, being a portion of the negotiable instrument act adopted in the

States of Oregon and Idaho, provides:

“Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein, and a signature on a blank paper delivered by the person making the signature, in order that the paper may be converted into a negotiable instrument, operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto, prior to its completion, it must be filled up strictly in accordance with the authority given, and within a reasonable time; but if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given, and within a reasonable time.”

In view of the negotiable instrument act, and of the authorities cited, we submit that the decision of the Court wherein the Court holds that, by reason of the fact that the case was submitted to the jury, and the jury found that the note was not signed in the form in which it appeared at the trial, was conclusive, and that, therefore, it was not necessary to pass upon the question whether the instrument, as filled in, was a negotiable instrument is erroneous.

At the close of the testimony, as shown by the record, the plaintiffs requested the Court to instruct the jury that the instrument was a negotiable promissory note, and objected to the refusal of the Court to so instruct, which objection was overruled, as shown by the record, page 148, and we submit that, under the admissions of

the defendant, above set forth, it was the duty of the Court to so instruct the jury. The question whether the instrument was a negotiable instrument or not was a question of law for the Court to decide, and not to be submitted to the jury. If the Court can say that the instrument, in the form sued upon, does not constitute a negotiable instrument, then, of course, the judgment must be affirmed; but, if the instrument in its present form is negotiable, then the fact that it was signed in blank by the defendant would be no defense as against the plaintiffs.

For the foregoing reasons, we respectfully submit that the Court should grant a rehearing herein, or reverse and set aside the judgment of the lower Court.

Respectfully submitted,

WILSON, NEAL & ROSSMAN,

Attorneys for Plaintiffs in Error.

United States of America,

District of Oregon.

I, O. A. Neal, one of the attorneys for the plaintiffs in error hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for purposes of delay.

.....,

Of Attorneys for Plaintiffs in Error.

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